TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 181.

WILLIAM McKAY (SUBSTITUTED FOR MARY KALYTON) ET AL., PLAINTIFFS IN ERROR,

vs.

AGNES KALYTON, BY LOUISE KALYTON, HER GUARDIAN *AD LITEM.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED JANUARY 12, 1906.

(20,045.)

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1 *Transcript.*

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff and Appellant,

vs.

MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHARLES WILKINS, as United States Indian Agent, Defendants and Respondents.

Appeal from the Circuit Court of Umatilla County. Honorable W. R. Ellis, Judge.

H. J. Bean, Attorney for Plaintiff and Appellant.
T. G. Hailey, Attorney for Defendant and Respondent.

Filed Mch. 30, 1903.

J. J. MURPHY, *Clk*,
By LEE MOORHOUSE, *Deputy*.

2 Be it remembered that heretofore, on the 30th day of December, 1899, a petition was filed in the office of the Clerk of the Circuit Court, in and for the County of Umatilla, and State of Oregon, in words and figures as follows:—

In the Circuit Court of the State of Oregon for Umatilla County.

AGNES KALYTON, Plaintiff,

vs.

MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHARLES WILKINS, as United States Indian Agent, Defendants.

Petition.

To the Honorable Stephen A. Lowell, Judge of the above entitled Court:

The petition of Louise Kalyton respectfully represents and shows to this Honorable Court:

I.

That Agnes Kalyton is a minor, under the age of Twenty One years, to-wit: of about the age of two years, and that your petitioner is the mother of said Agnes Kalyton.

II.

That the defendant Charles Wilkins, is the duly appointed, qualified and acting United States Indian Agent at the Umatilla Indian Reservation, in Oregon.

III.

That said Agnes Kalyton is the female child of Joe Kalyton, deceased, and your petitioner.

3 IV.

That on or about the 25th day of December, 1898, said Joe Kalyton, who was then a Cayuse Indian Number 246, and a member of one of the tribes of Indians residing on the Umatilla Indian Reservation in the State of Oregon, died intestate at Umatilla County, State of Oregon, seized and possessed of the following described real estate, to-wit:

Lot- six (6) and seven (7) and the North half of the Southeast quarter of section 31, in Township 3 North, of Range 34 East of the Willamette Meridian, in Umatilla County, State of Oregon, being a part of the Umatilla Indian Reservation and containing 157 acres.

V.

That said land was duly allotted to said Joe Kalyton on or about the 21st day of April, 1891, by the Government of the United States of America, under and by virtue of the provision of an act of Congress, entitled "An Act providing for the allot/ment of land in severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes"; which said Act was approved March 3rd, 1885, and the amendments thereto; that said allot/ment was duly approved by the Department of the Interior of the United States of America, on the 12th day of April, 1893.

VI.

That said Act of Congress provides that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allot/ment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that
4 at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid in fee, discharged of said trust, and free of all charge or encumbrance whatsoever. That said Act further provides: that the law of alienation and descent in force in the State of Oregon shall apply thereto after the patents have been executed.

VII.

That said Joe Kalyton, deceased, left as an heir, the said Agnes Kalyton, who is the sole heir at law of the said Joe Kalyton, deceased. And that said Joe Kalyton left no other child nor any issue of any deceased child of said Joe Kalyton deceased.

VIII.

That under the laws of the State of Oregon, and the provisions of said Act of Congress, said plaintiff Agnes Kalyton, is entitled to have all of said land of said deceased, descend to her, and is entitled to have the immediate possession and the present rents, issues and profits thereof.

XI.

That the defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-ta-mop-net wrongfully, fraudulently and without any right whatever, claim to be the heirs of said Joe Kalyton, deceased, and claim to be the owners of and entitled to the possession of said land, and have ever since the death of the said Joe Kalyton, wrongfully, unlawfully and fraudulently, held and retained possession of said land, and have prevented said plaintiff, Agnes Kalyton, from taking possession thereof, and from collecting the rents of said land, or having any benefit therefrom.

5

X.

That the present rental value of said land is $1.75 per acre, per annum, and of the aggregate value of $274.75 per annum.

XI.

That all of the above named defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, and Al-on-ta-mop-net are Indians, residing upon said Umatilla Indian Reservation, and have no property with which to satisfy any judgment or claim against them, or either of them, and that each of said last named defendants is insolvent.

XII.

That said last named defendants threaten to and will, unless restrained by this Honorable Court, prevent and hinder the plaintiff, Agnes Kalyton, from taking possession of said land and from renting the same, and from collecting the rents or having any use or benefit from said land, or cultivating the same and that said last named defendant, acting together with said John R. Glasscock, and by and through said Charles Wilkins, the United States Indian Agent, as aforesaid, will use and lease said land, and collect the rents, issues and profits thereof, and that said plaintiff Agnes Kalyton, will be thereby irreparably injured and defrauded of her just rights in the premises.

XIII.

That under the rules and regulations of the Department of the Interior of the United States of America, before the plaintiff can obtain any benefit, or the rents or profits from said land, or establish any right thereto, it is necessary that it be declared by a

Court of competent jurisdiction under the laws of the State of Oregon, who the legal heirs of said deceased *is*.

6 XIV.

That patent for said land has been duly issued by the Government of the United States to said Joe Kalyton, deceased.

XV.

That plaintiff has no plain speedy or adequate remedy at law.

Wherefore, your petitioner prays that your petitioner be appointed by this Honorable Court as Guardian *ad-litem* for said minor, Agnes Kalyton, to appear for, and commence and prosecute to a final determination, a suit against the above named defendants, in this Honorable Court, and in order to establish and protect the rights of said minor plaintiff, and to obtain and establish the rights of the said Agnes Kalyton to said land.

H. J. BEAN,
Attorney for Petitioner.

STATE OF OREGON, *County of Umatilla, ss:*

I, Louise Kalyton, being first duly sworn, say: I am the petitioner above named, and that the foregoing petition is true as I verily believe.

her
LOUISE x KALYTON.
mark.

Subscribed and sworn to before me this 30th day of December 1899.

J. H. LAWREY,
[SEAL.] *Notary Public for Oregon.*

And afterwards, on the 30th day of December, 1899, there was filed in the office of the Clerk of said Court, an order in words and figures as follows:

7 In the Circuit Court of the State of Oregon for Umatilla County.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *Ad Litem*, Plaintiff,

vs.

MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, Mrs. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHARLES WILKINS, as United States Indian Agent, Defendants.

Order.

It duly appearing to the Court from the verified petition of Louise Kalyton, on file herein, as follows:—

I.

That Agnes Kalyton is a minor, under the age of twenty-one years, to-wit: of about the age of two years, and that your petitioner is the mother of said Agnes Kalyton.

II.

That the defendant, Charles Wilkins, is the duly appointed, qualified and acting United States Indian Agent at the Umatilla Indian Reservation, in Oregon.

III.

That said Agnes Kalyton is the female child of Joe Kalyton deceased, and your petitioner.

IV.

That on or about the 25th day of December, 1898, said Joe Kalyton, who was then a Cayuse Indian, Number 246, and a member of one of the tribes of Indians residing on the Umatilla Indian Reservation in the State of Oregon, died intestate at Umatilla County, State of Oregon, seized and possessed of the following described real estate, to-wit:

8 Lot six (6) and seven (7) and the North half of the Southeast quarter of section 31, in Township 3 North, of Range 34 East of the Willamette Meridian in Umatilla County, State of Oregon, being a part of the Umatilla Indian Reservation, and containing 157 acres.

V.

That said land was duly allotted to said Joe Kalyton on or about the 21st day of April, 1891, by the Government of the United States of America, under and by virtue of the provision of an Act of Congress, entitled "An Act providing for the Allotment of land in Severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes;" which said Act was approved March 3d 1885, and the amendments thereto; that said allotment was duly approved by the Department of the Interior of the United States of America on the 12th day of April 1893.

VI.

That said Act of Congress provides that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period, the United States will convey the same by patent to said Indian or his heirs as aforesaid in fee, discharged of said trust, and free of all charge or encumbrance whatsoever, that said Act further provides, that the law of alienation and descent in

force in the State of Oregon shall apply thereto after the patents have been executed.

9

VII.

That said Joe Kalyton, deceased, left as an heir, the said Agnes Kalyfon, who is the sole heir at law of the said Joe Kalyton, deceased, and that said Joe Kalyton, deceased, left no other child or the issue of any deceased child of said Joe Kalyton, nor any other heir.

VIII.

That under the laws of the State of Oregon, and the provisions of said Act of Congress, said plaintiff, Agnes Kalyton, is entitled to have all of said land of said deceased, descend to her, and is entitled to have the immediate possession and the present rents, issues and profits thereof.

IX.

That the defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and At-on-ta-mop-net wrongfully, fraudulently and without any right whatever, claim to be the heirs of said Joe Kalyton, deceased, and claim to be the owners of and entitled to the possession of said land, and have, ever since the death of the said Joe Kalyton, wrongfully, unlawfully and fraudulently, held and retained possession of said land, and have prevented said plaintiff, Agnes Kalyton, from taking possession thereof, or from collecting the rents of said land, or having any benefit therefrom.

X.

That the present rental value of said land is $1.75 per acre, per annum, and of the aggregate value of $274.75 per annum.

XI.

That all of the above named defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and At-on-ta-mop-net are Indians, residing upon said Umatille Indian Reservation,

10 and have no property with which to satisfy any judgment or claim against them, or either of them, and that each of said last named defendants is insolvent.

XII.

That said last named defendants threat to and will, unless restrained by this Honorable Court, preven and hinder the plaintiff, Agnes Kalyton, from taking possession of said land, and from renting the same, and from collecting the rents or having any use or benefit from said land, or cultivating the same, and that said last named defendant acting together with said John R. Glasscock and by and through said Charles Wilkins, the United States Indian Agent, as aforesaid, will use and lease said land, and collect the rents, issues and profits thereof, and that said plaintiff Agnes Kalyton, will

be thereby irreparably injured and defrauded of her just rights in the premises.

XIII.

That under the rules and regulations of the Department of the Interior of the United States of America, before the plaintiff can obtain the benefit or the rents or profits from said land, or establish any rights thereto, it is necessary that it be declared by a Court of competent jurisdiction under the laws of the State of Oregon, who the legal heir of the said deceased is.

XIV.

That patent for said land has been duly issued by the Government of the United States to said Joe Kalyton, deceased.

XV.

That plaintiff has no plain, speedy or adequate remedy at law.

Now therefore, on motion of H. J. Bean, attorney for said plaintiff and petitioner, it is hereby ordered by the Court that said
11 Louise Kalyton be, and she is hereby appointed as Guardian *ad litem* for said minor, Agnes Kalyton, to commence, appear for and prosecute to a final determination a suit against the above named defendants, on behalf of said plaintiff Agnes Kalyton, in this Court, for the purpose of establishing the rights of said minor plaintiff, to the above described land, and in order that the said plaintiff, Agnes Kalyton may be declared to be the heir at law of Joe Kalyton, deceased, and entitled to the immediate possession, and to the present use, rents, issues and profits of said land.

Done and dated at Pendleton, Oregon, this 30th day of December 1899.

STEPHEN A. LOWELL,
Circuit Judge.

And afterwards on the 30th day of December 1899, there was filed in the office of the Clerk of said Court, an oath of guardian *ad litem*, in words and figures as follows:—

(Title of Court and Cause.)

STATE OF OREGON, *County of Umatilla, ss:*

I, Louise Kalyton, being first duly sworn, says: I am the duly appointed Guardian *Ad Litem* of Agnes Kalyton, in the above entitled suit; that I will support the Constitution of the United States, and the Constitution of the State of Oregon and that I will faithfully discharge the duties of said Guardian *ad litem* in the above entitled suit to the best of my ability; So help me God.

her
LOUISE x KALYTON.
mark

12 Subscribed and sworn to before me this 30th day of December 1899.

[SEAL.] J. H. LAWREY,
Notary Public for Oregon.

And afterwards, on the 30th day of February 1899, there was filed in the office of the Clerk of said Court, a complaint in words and figures as follows:—

(Title of Court and Cause.)

The plaintiff above named for cause of suit against the above named defendants, by Louise Kalyton, her guardian *ad litem,* complains and alleges as follows:—

I.

That plaintiff, Agnes Kalyton, is a minor, under the age of twenty-one years, to-wit: of about the age of two years, and that Louise Kalyton, is the duly appointed, qualified and acting guardian *ad litem* for said Agnes Kalyton in this suit, duly appointed by the above entitled Court.

II.

That the defendant, Charles Wilkins is the duly appointed, qualified and acting United States Indian Agent at the Umatilla Indian Reservation, in Oregon.

III.

That said Agnes Kalyton is the female child of Joe Kalyton, deceased, and Louise Kalyton. That said Louise Kalyton is and was at all the dates and times herein mentioned, an Indian woman and a member of the Cayuse tribe of Indians, residing on said Umatilla Indian Reservation.

That said Joe Kalyton, deceased was at all the dates and times herein mentioned, until the time of his death a male Indian
13 and a member of the Cayuse tribe of Indians, Number 246, residing on the said Umatilla Indian Reservation.

IV.

That on or about the year 1893, said Louise Kalyton, and Joe Kalyton were duly married in accordance with the customs and laws of said tribe of Indians, at said Umatilla Indian Reservation, and thereafter lived and cohabited together as husband and wife, according to the custom and manner of Indian life, for a period of about five years, and that said Agnes Kalyton is the issue of said marriage and cohabitation.

That on or about the — day of —— 1898, said Joe Kalyton died intestate at Umatilla County, State of Oregon, seized and possessed of the following described real estate, to wit: Lots six (6) and seven (7), and the North half of the Southeast quarter of section 31,

in Township 3 North of Range 34 East of the Willamette Meridian, in Umatilla County State of Oregon, being a part of the Umatilla Indian Reservation, and containing 157 acres.

V.

That said land was duly allotted to the said Joe Kalyton on or about the 21st day of April 1891, by the Government of the United States of America, under and by virtue of the provisions of an Act of Congress, entitled An Act providing for the Allotment of land in Severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes;" which said Act was approved March 3rd, 1885, and the amendments thereto; that said allotment was duly approved by the Department of the Interior of the United States of America on the 12th day of April 1893.

14 VI.

That said Act of Congress provides that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust, and free of all charge or encumbrance whatsoever. That said Act further provides that the law of alienation and descent in force in the State of Oregon shall apply thereto after the patents have been executed.

VII.

That said Joe Kalyton, deceased, left as an heir, the said plaintiff, Agnes Kalyton, and that said Joe Kalyton left no other child or heir and that said plaintiff Agnes Kalyton, is the sole heir at law of the said Joe Kalyton deceased.

VIII.

That under the laws of the State of Oregon, and the provisions of said Act of Congress, said plaintiff, Agnes Kalyton, is entitled to have all of said land of said deceased, descend to her, and is entitled to have the immediate possession, and the present use and the rents, issues and profits thereof.

IX.

That the defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, and Al-on-ta-mop-net wrongfully, fraudulently and without any right whatever, claim to be the heirs of said Joe Kalyton, deceased, and claim to be the owners of, and entitled to the possession of said land and have, ever since the death of the

said Joe Kalyton, wrongfully, unlawfully and fraudulently
15 held and retained possession of said land, and have used and occupied the same, and collected and used the rents, issues and profits thereof, and have prevented said plaintiff, Agnes Kalyton from taking possession thereof, or from collecting the rents from said land or having any benefit therefrom.

X.

That the present rental value of said land is $1.75 per acre per annum, and of the aggregate value of $274.75 per annum.

XI.

That all of the above named defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-ta-mop-net are Indians, residing upon said Umatilla Indian Reservation, and have no property subject to sale upon execution, whereby any judgment against them, or either of them, might be satisfied, and that each of said last named defendants are insolvent.

XII.

That said last named defendant threaten to and will, unless restrained by this Honorable Court, prevent and hinder the plaintiff Agnes Kalyton, from taking possession of said land, and from renting the same, and from collecting the rents, or having any use or benefit from said land or cultivating the same, and that said last named defendants acting together with *with* said John R. Glasscock, and by and through said Charles Wilkins, United States Indian Agent, as aforesaid, will use and lease said land and collect the rents, issues and profits thereof, and that said plaintiff Agnes Kalyton will be thereby irreparably injured and defrauded of her just rights in the premises, and prevented from obtaining any use, rent, issues or profits from said land.

16 XIII.

That under the rules and regulations of the Department of the Interior of the United States of America, before the plaintiff can obtain any benefit or the rents or profits from said land, or establish any right thereto, it is necessary that it be declared by a court of competent jurisdiction under the laws of the State of Oregon, who the legal heir of said deceased is.

XIV.

That the defendant John R. Glasscock, has or claims to have some interest in or claim upon said land, the exact nature of which is to the plaintiff unknown; but that the same is fraudulent and void as against this plaintiff.

XV.

That plaintiff has no plain speedy or adequate remedy at law.

Wherefore, plaintiff prays for a decree of this Honorable Court; that plaintiff Agnes Kalyton, be declared to be the sole heir at law of said Joe Kalyton, deceased, and the owner of and entitled to the immediate possession of all the land of said deceased above described.

That the defendants Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-ta-mop-net be declared to have no right, title or interest in or to said described land or any part thereof, or to the use, rents and profits thereof.

That each and all of the defendants be enjoined and inhibited from in any manner interfering with plaintiff in the exercise of her right to said land, and that each of said defendants their servants or agents, and all persons acting by, under or through them or either of them, be enjoined and inhibited from taking possession of
17 said land, or any part thereof, or in any way interfering with plaintiff's possession and use of said land.

And that each of said defendants be restrained and inhibited from leasing said land, or collecting the rents, issues or profits thereof until the final determination of this suit, and that upon the final determination of this suit, *and that upon the final determination of this suit*, said order and injunction be made perpetual: That plaintiff may have judgment for her costs and disbursements in this suit.

That plaintiff may have such other and further relief as to this Honorable Court may seem meet and equitable in the premises:

And plaintiff as in duty bound will ever pray.

H. J. BEAN,
Attorney for Plaintiff.

STATE OF OREGON, *County of Umatilla, ss:*

I, Louise Kalyton, being first duly sworn say: I am the duly appointed Guardian *ad litem* for the above named plaintiff, Agnes Kalyton, in this suit, and that the foregoing complaint is true, as I verily believe.

her
LOUISE x KALYTON.
mark.

Subscribed and sworn to before me this 30th day of December 1899.

J. H. LAWREY,
[SEAL.] *Notary Public for Oregon.*

And afterwards, on the 5th day of February 1900, there was filed in the office of the Clerk of said Court, a summons in words and figures as follows:—

18 (Title Court and Cause).

To Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Katon, Al-on-ta-mop-net, John R. Glascock and Charles Wilkins as United States Indian Agent, defendants.

In the name of the State of Oregon, you are hereby required to appear and answer the complaint filed against you in the above entitled suit, within ten days from the date of the service of this summons upon you, if served in Umatilla County; or if served in any other County in the State of Oregon, then within twenty days from the date of such service upon you.

And you will take notice that if you fail to appear and answer or plead within said time, plaintiff, for want thereof, will apply to the Court for the relief prayed for in the complaint filed herein, to-wit: That plaintiff be declared to be the sole heir at law of Joe Kalyton, deceased, and entitled to all of the land of said deceased; that each of said defendants be declared to have no right, title or interest in or to said land, or any part thereof, and that they each be restrained from in any manner interfering with plaintiffs' use, and occupation of said land, and for plaintiffs costs and disbursements of this suit.

H. J. BEAN,
Attorney for Plaintiff.

STATE OF OREGON, *Umatilla County, ss:*

To the Sheriff of Umatilla County, Oregon:

You are hereby directed to serve a copy of the complaint in the within entitled suit with a summons in the said suit upon the defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-to-mop-net only; and to serve summons only without copy of complaint in said suit upon each of the
19 other defendants.

H. J. BEAN,
Attorney for Plaintiff.

Dated this 30th day of December, 1899.

(Endorsed as follows:)

STATE OF OREGON, *County of Umatilla, ss:*

I, W. M. Blakely, Sheriff of Umatilla County, State of Oregon, do hereby certify that I served the annexed summons, within said county and State, on the 27th day of January, 1900, on the within named defendants Mary Kalyton, Pete Kalyton, Little Pete Kalyton, and Al-on-ta-mop-net, by delivering to said Mary Kalyton, Pete Kalyton, Little Pete Kalyton and Al-on-ta-mop-net each personally and in person, a true copy thereof, duly certified to be such copy by me as Sheriff, together with a copy of the Complaint in the within cause, certified to be such copy by H. J. Bean, plaintiff's attorney

that I further served the said Summons within said County and State, on the 3d day of February, 1900, on the within named defendant, Mrs. Ida Caton by delivering to said Mrs. Ida Caton, personally and in person, a true copy thereof, duly certified to be such copy by me as Sheriff, together with a copy of the Complaint in the within cause, duly certified to be such copy by H. J. Bean, Plaintiff's Attorney; that I further served the said summons within said County and State on the 12th day of January, 1900, on the within named defendant John R. Glascock by delivering to said John R. Glascock personally and in person a true copy thereof, duly certified to by me as Sheriff; that I further served the said Summons within said County and State on the 30th day of January, 1900, on the within named defendant Charles Wilkins as United States Indian
20 Agent by delivering to said Charles Wilkins as United States Indian Agent, personally and in person a true copy thereof, duly certified to be such copy by me as Sheriff.

W. M. BLAKELY, *Sheriff.*

And afterwards on the 6th day of February, 1900, there was filed in the office of the Clerk of said Court, a demurrer in words and figures as follows:

(Title Court and Cause.)

Comes now all of the above named defendants except the defendant Charles Wilkins as Indian Agent and Demur to the Complaint filed herein for the reason that the same does not state facts sufficient to constitute a cause of suit against these defendants or either of them and for the further reason that the Court has no jurisdiction of the subject matter of this suit.

T. G. HAILEY,
Attorney for the Defendants.

(Endorsed as follows:)

STATE OF OREGON, *County of Umatilla, ss:*

Service by copy of the within demurrer is hereby accepted within Umatilla County, Oregon, this 5th day of February 1900, and all other and further service waived.

H. J. BEAN,
Attorney for Plaintiff.

And afterwards on the 18th day of September 1900, the same being the 31st judicial day of the June term of said Court,
21 Journal entry was made on said Demurrer, in words and figures as follows:

(Title Court and Cause.)

On this day this cause coming on to be heard upon the demurrer of the defendants, filed herein, plaintiffs appearing — H. J. Bean their attorney, and defendants by T. G. Hailey their attorney, and

the Court having heard the usual argument of said attorneys, by agreement it is hereby ordered that this cause be and the same is hereby taken under advisement and said Attorneys are to furnish written briefs herein.

(Sig.) W. R. ELLIS,
Circuit Judge.

And afterwards on the 2nd day of April 1901, the same being the 30th Judicial day of the January term of said Court, an order was made overruling said demurrer, in words and figures as follows.

(Title Court and Cause.)

On this day this cause coming on for decision upon the demurrer of the defendants heretofore filed herein, the same having been heretofore argued by counsel, for the respective parties and submitted to the Court; and the Court having fully considered the same the plaintiff appearing at this time by H. J. Bean, her attorney, and the defendants by T. G. Hailey, their attorney.

It is hereby ordered, that the said demurrer be and the same is hereby overruled as to the question of jurisdiction, and is
22 sustained as to the question of the sufficiency of the facts stated in the Complaint to constitute a cause of suit, and

It is further ordered, that plaintiff have one day in which to further plead herein.

(Sig.) W. R. ELLIS,
Circuit Judge.

And afterwards, on the 9th day of April, 1901, there was filed in the office of the Clerk of said —, a motion in words and figures as follows:

(Title Court and Cause.)

Comes now the above named plaintiff, by Louis- Kalyton her Guardian *ad litem*, by H. J. Bean, her attorney, and moves the Court for a rehearing, and reconsideration of the decision of this honorable Court, upon the demurrer of defendants to plaintiff's complaint rendered herein, for the following reasons.

That the Court held and decided that the alleged marriage of Joe Kalyton and Louise Kalyton, the father and mother of plaintiff was illegal, for the reason that said Indians had been allotted land, under the provisions of the act of Congress March 3, 1885.

And that the Complaint and record does not show, that said Louise Kalyton, has been allotted any land.

That this Honorable Court held, that said Joseph Kalyton and Louise Kalyton, were subject to the laws of the State of Oregon, in the matter of marriage, under the provisions of the Act of Congress of February 8, 1887, and therein erred as the Supreme Court of the State of Oregon, in the case of McBean *v.* McBean, 61 Pac.
23 Rep. page 422 has held that "While the act of 1897 was general in its purpose, it seems there was no intention of ex-

nding its provisions, to the Umatilla Reservation, and the Indians concerned," and in effect that said Act of Congress of 1887, does not apply to the Umatilla Reservation or to the Indians thereon.

In support of the first contention we beg to submit that the marriage between an Indian man and an Indian woman while sustaining their tribal relations, in accordance with the customs and laws of such Indian Tribes would be valid, and is recognized by all of the Courts in the United States, both State and Federal.

Nelson on Marriage and Divorce, Vol. 1, sec. 34.
Earl *v.* Godley, 42 Minn. 361.
Compo *v.* Jackson Iron Co., 76 Mich. 585.
Kobogum *v.* Jackson Iron Co., 76 Mich. 498.
Johnson *v.* Johnson, 30 Mo. 72; 77 Am. Dec. 598.
Boyer *v.* Diveley, 58 Mo. 510.
La Riviere *v.* La Rivere 77 Mo. 517.

That a marriage between a white person and an Indian is governed by the same law as that between Indians.

McBean *v.* McBean, 56 Pac. Rep. 418.
Bishop on Marriage and Divorce Vol. 1 Sec. 306.
Nelson on Marriage and Divorce, Vol. 1, sec. 34.

hence although the husband Joe Kalyton, may under the law be a Citizen of the United States, and even a white person, his marriage with Louise Kalyton, who as it is alleged in the Complaint, "Is and was at all the dates and times herein mentioned, and Indian woman, and a member of the Cayuse tribe of Indians, residing on said Umatilla Indian Reservation," in accordance with the Customs and Laws of the said tribe of Indians, would be valid, and the issue of such marriage would be legitimate, and even though the
24 father might be a citizen of the United States. This point having been practically overlooked, in the argument of this cause upon demurrer, we respectfully ask for a rehearing especially upon this point.

H. J. BEAN,
Attorney for Plaintiff.

Endorsed.

STATE OF OREGON, *County of Umatilla, ss:*

Service by copy, of the within motion, is hereby admitted within —— County, and State of Oregon, this 9th day of April, A. D. 1901, and all further and other service is hereby waived.

T. G. HAILEY,
Att'y for Pl'ff.

And afterwards, on the 12th day of April 1901, there was filed in the office of the Clerk of said Court, an answer in words and figures as follows:—

(Title Court and Cause.)

Comes now the defendant Mary Kalyton, and makes the following separate answer to the complaint filed herein:

1.

Denies that said Agnes Kalyton is the female child of Joe Kalyton, deceased, and Louise Kalyton; admits that said Louise Kalyton is, and was, at all the times and dates mentioned in said complaint, an Indian woman, and that prior to the allotment of the lands mentioned in said complaint she was a member of the Cayuse tribe of Indians, residing upon said Umatilla Indian Reservation; and admits that Joe Kalyton, deceased, was prior to the time of the allotment of lands mentioned in said complaint an Indian and a member of the Cayuse tribe of Indians residing upon said Reservation.

2.

Denies that on or about the year 1893, or at any other time said Louise Kalyton and Joe Kalyton, were duly or otherwise married in accordance with the customs or laws of said tribe of Indians, or at all, at said Umatilla Reservation or elsewhere, or thereafter or at all lived or cohabited together as husband and wife according to the custom or manner of Indian life or at all, for a period of about five years or at any time and denies that said Agnes Kalyton is the issue of said marriage or cohabitation; admits that said Joe Kalyton died intestate in Umatilla County State of Oregon, about the year 1898, seized and possessed of the lands described in the complaint, which were allotted to him as set out in paragraph five of the complaint herein.

3.

Denies that the said Joe Kalyton left as an heir the said Agnes Kalyton, plaintiff herein; and denies that said Agnes Kalyton is the sole or any heir at law or otherwise of said Joe Kalyton; and denies that said Joe Kalyton left no other heir.

4.

Denies that, under the laws of the State of Oregon, or the provisions of said Act of Congress, said Agnes Kalyton is entitled to have all or any of the said lands of deceased descend to her, or is entitled to have immediate or any possession, or the present or any use, or rents, issues, or profits thereof or of any part thereof; denies that this defendant Mary Kalyton, wrongfully fraudulently or without any claim whatever, claims to be the heir of said Joe Kalyton deceased; and admits that she claims to be the owner, and entitled to the possession of said lands; but denies that she has ever since his death, wrongfully, unlawfully, held or retained possession of said lands; and admits that she has used and occupied the same and collected and used the rents issues and profits thereof, and has prevented said Agnes Kalyton from taking pos-

session thereof or from collecting the rents of said lands or having any benefit therefrom; and denies that said other defendants have or claim any right in or to said lands, or any part thereof.

5.

Admits that this defendant will prevent and hinder the plaintiff Agnes Kalyton, from taking possession of said lands and from renting the same, and from collecting the rents or having any use or benefits from said lands or cultivating the same; but denies that this defendant is in anywise acting in connection with said John R. Glascock, or that said John R. Glascock claims any interest in said lands, or by or through said defendant Wilkins, this defendant will use or lease said lands; and denies that said Agnes Kalyton will thereby, or otherwise, be irreparably or otherwise injured or defrauded of her just or any rights, or prevented from obtaining any use, rents, issues, or profits of said lands.

6.

Denies that John R. Glascock has or claims to have any interest in or claim upon said lands or any part thereof.

7.

Denies that plaintiff has no plain, speedy, or adequate remedy at law.

And further answering said complaint this defendant alleges.

27 1.

That at the time said alleged marriage is alleged to have occurred, and for a long time prior and subsequent thereto, said Joe Kalyton deceased, and said Louise Kalyton were Indians to whom separate allotments had been made of land upon the Umatilla Indian Reservation in Oregon, under the provisions of an Act of Congress entitled, "An Act providing for the allotment of land in severalty, to the Indians residing upon the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes," Approved March 3d 1885, and were born within the territorial limits of the United States.

2.

That said allottments were made to said Joe Kalyton and said Louise Kalyton, the latter under the name of Louise, on or about April 21st 1891, and said allottees, immediately accepted the same, entered upon, and took possession thereof, and said Joe Kalyton continued in possession of his allotment from such time, until about the year 189- when he died, and said Louise, ever since said allotment has been and now is in possession of her allotment.

3.

That said Joe Kalyton is Allottee No. 246 on the list of Cayuse Indians Allotted on said Reservation and said Louise is No. 217 on said list.

4.

That said alleged marriage, if any, was performed after said allotments had been made and accepted by said Joe Kalyton and said Louise as aforesaid, and was not in accordance with the laws of the State of Oregon in force at said time, but, if at all, was in accordance with the laws and customs of said Cayuse tribe of Indians,
28 and not otherwise, and was, and is, therefore, void.

And further answering said complaint, and as a cross-complaint herein, this defendant alleges:

1.

That on or about April 21st 1891, Joe Kalyton was residing upon the Umatilla Indian Reservation in Umatilla County, Oregon, and was a member of the Cayuse tribe of Indians residing upon said Reservation.

2.

That under the provisions of an act of Congress, entitled, "An Act providing for the allotment of lands in severalty to the Indians residing upon the Umatilla reservation, in the State of — and granting patents therefor, and for other purposes," approved March 3d 1885, the following described lands were allotted to said Joe Kalyton, to-wit: Lots 6 and 7, and the North half of the Southeast quarter of Section 31 in ownship 3 North of Range 34 E. W. M. in Umatilla County State of Oregon containing 157 acres which said Allotment was accepted by said Joe Kalyton, and he immediately entered upon and took possession thereof, and continued in possession thereof and the use and enjoyment of the rents and profits thereof until the —— day of —— 189—, when he died.

3.

That at the time of his death he was a resident and citizen of the State of Oregon, and died unmarried, and without any lineal descendants, leaving surviving him, as the sole and only heir at law, this defendant, who is his sister.

4.

That the plaintiff herein claims to have some right, title or interest in or to the lands hereinbefore described, and a right to the
29 use and enjoyment of the present rents, issues, and profits thereof, but has no interest whatsoever in or to said lands, or to the rents, issues or profits thereof, or any part thereof; that this defendant is entitled to possession of said lands, and to the use and enjoyment of all rents, issues, and profits thereof, and that said plaintiff threatens to, and will, unless restrained by an order of this Court, enter upon and take possession of said lands, and collect the rents, issues, and profits thereof to the irreparable damage of this defendant.

Wherefore, having fully answered said complaint, defendant prays that a decree may be entered herein declaring her to be the sole and only heir at law of said Joe Kalyton deceased, and as such, the owner of and entitled to the possession of all of the lands described in her said answer herein as having been allotted to said Joe Kalyton, and

to the use of all rents, issues, and profits thereof, and perpetually enjoining said plaintiff, or any one claiming by, through, under or from her, from in any wise interfering with said lands or the possession thereof, or any part thereof, or the rents, issues, and profits arising therefrom and declaring that said plaintiff has no right, title or interest in, or to said lands, or any part thereof, and for such other and further relief herein as to the Court may seem meet and equitable.

T. G. HAILEY,
Attorney for the Defendant, Mary Kalyton.

STATE OF OREGON, *Umatilla County, ss:*

I Mary Kalyton, being first sworn, say that I am the defendant named in the foregoing answer, know the contents thereof, and the same is true.

30 —— ——.

Subscribed and sworn to before me this —— day of April 1901.

——— ———,
Notary Public for Oregon.

STATE OF OREGON, *Umatilla County, ss:*

Service by copy of the within answer is hereby accepted within Umatilla County, Oregon, this 11th day of April 1901 and all other and further service waived.

——— ———,
Attorney for pl'ff.

And afterwards, on the 12th day of April 1901, there was filed in the office of the Clerk of said court a demurrer to answer in words and figures as follows:

(Title of Court and Cause.)

Comes now the above named plaintiff by H. J. Bean, her attorney, and demurs to the new matter contained in the separate answer of defendant, Mary Kalyton, for the reason that said answer does not state facts sufficient to constitute a defense to plaintiff's complaint or any part thereof.

Plaintiff Demurs to the further answer and cross complaint of said defendant, Mary Kalyton, for the reason that the same does not state facts sufficient to constitute a defense to plaintiff's complaint or a cause of suit or for equitable relief or any part thereof.

H. J. BEAN,
Attorney for Plaintiff.

And afterwards, on the 12th day of April, 1901, there was filed in the office of the Clerk of said Court a disclaimer in words and

31 figures as follows:

(Title Court and Cause.)

Come now the defendants, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-ta-mop-net and disclaim any claim or interest in or to the lands mentioned in the complaint filed herein or in or to any part thereof, and say that they never had, and have not and never claimed to have had any right title or interest in or to any of the lands mentioned in the complaint herein and do not claim and none of them claims to be the heir at law or otherwise of said Joe Kalyton, and ask that this suit be dismissed as to them and each of them with costs against the plaintiff.

T. G. HAILEY,
Attorney for the Defendants Above Named.

STATE OF OREGON, *Umatilla County, ss:*

We, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, and Al-on-ta-mop-net, being first duly sworn do say each for himself and herself, that I am one of the defendants above named and know the contents of the foregoing answer and the same is true.

his
PETE x KALYTON.
mark.

his
LITTLE PETE x KALYTON.
mark.

her
MRS. IDA x CATON.
mark.

his
AL-ON- x TA-MOP-NET.
mark.

Subscribed and sworn to before me this 5th day of Feb. 1900.

T. G. HAILEY,
Notary Public for Oregon.

And afterwards, on the 10th day of February, 1902, there was filed in the office of the Clerk of said Court, a Reply was filed in words and figures and figures as follows:—

32 (Title Court and Cause.)

Comes now the above named plaintiff, Agnes Kalyton, by Louise Kalyton, her duly appointed, qualified and acting Guardian *ad litem*, in this suit, and for reply to the new matter contained in the separate answer of defendants, Mary Kalyton, filed herein denies and avers as follows:—

I.

Denies that the marriage alleged in plaintiff's complaint was in accordance with the laws of the State of Oregon in force at said time, or was or is, in any manner void.

II.

Denies that at the time of the death of Joe Kalyton, a citizen of the State of Oregon, or died unmarried, or without any lineal de-

scendants, or leaving surviving him as the sole or only, or any heir, at law, or otherwise, this defendant, either who is his sister or otherwise.

III.

Denies that plaintiff has no interest in or to said lands, or the rents, issues or profits thereof, or any part thereof, but avers that plaintiff is entitled thereto as in plaintiff's complaint alleged; Denies that this defendant is entitled to the possession of said lands, or any part thereof, or to the use or enjoyment of all or any rents, or issues or profits thereof, or any part thereof, admits that plaintiff will, unless restrained by and order of this Court, enter upon and take possession of said lands, collect the rents, issues and profits thereof; but denies that the same will be irreparably, or any damage, to this defendant, or in any manner except rightfully.

Wherefore plaintiff prays for a decree as in her complaint.

H. J. BEAN,
Attorney for Plaintiff.

33 STATE OF OREGON, *County of Umatilla, ss:*

Due service of the within reply is hereby admitted and accepted and a copy thereof received at Pendleton, Umatilla County, Oregon, this 10th day of February, A. D. 1902.

T. G. HAILEY,
Attorney for Defendant Mary Kalyton.

And afterwards, on the 14th day of July, 1902, there was filed in the office of the Clerk of said Court, as findings of fact and conclusions of law in words and figures as follows:—

(Title Court and Cause.)

I.

That plaintiff Agnes Kalyton, is a minor under the age of twenty-one years, to-wit: of about the age of two years at the beginning of this suit; and that Louise Kalyton is the duly appointed, qualified and acting guardian *ad litem* of said Agnes Kalyton in this suit, appointed by the above entitled Court.

II.

That defendant Charles Wilkins, is the duly appointed qualified and acting Indian Agent at the Umatilla Indian Reservation, in Oregon.

III.

That on or about the — day of January, 1898, Joe Kalyton died intestate in Umatilla County, State of Oregon, seized and possessed of the following described real estate to-wit; Lot six (6) and seven (7) and the North half (½) of the Southeast quarter (¼) of Sec-

tion Thirty-one (31) North of Range Thirty-four (34) E. W. M. in Umatilla County, State of Oregon, being a part of the
34 Umatilla Indian reservation, and containing One hundred and fifty-seven (157) acres which lands were duly allotted to Joe Kalyton on or about the 21st day of April, 1891, by the Government of the United States of America under and by virtue of the provisions of an act of Congress entitled "An Act providing for the allottment of land in severalty to the Indians residing on the Umatilla Indian Reservation in the State of Oregon, and granting patents therefor, and for other purposes," which said Act was approved March 3rd, 1885, and the amendments thereto which said allottments were duly approved by the Department of the Interior of the United States of America, on the 21st day of April, 1893.

IV.

That said Act of Congress provides that the United States does, and will, hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allottment shall have been made; or in case of his decease, of his heirs according to the laws of the State of Oregon; and that at the expiration of said period, the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharge of said trust, and free of all charge or incumbrance, whatsoever; and further provides that the law of alienation and descent in force in the State of Oregon, shall apply thereto after the patents have been executed.

V.

That said Louise Kalyton, guardian *ad litem* of said plaintiff herein, Agnes Kalyton, is the mother of said Agnes Kalyton, and that during the year 1893 and after said lands had been allotted to said Joe Kalyton, as aforesaid, he began to live with said Louise Kalyton, and they continued to live together, but no mar-
35 riage ceremony was ever performed making them husband and wife, and no marriage license was ever procured by them, and they continued to live together within Umatilla County, State of Oregon, without any marriage ceremony having been performed for them until some weeks prior to the death of said Joe Kalyton, when they separated and were not living together at the time of his death, and had not been living together for some weeks prior thereto; and that said Louise Kalyton, prior to living with said Joe Kalyton had lived with one White Wolf, and at various times prior to that had lived with three other Indians as their wife and had never been divorced from any of said Indians by any Court, but had merely separated from them.

VI.

That at the time the said Joe Kalyton and Louise Kalyton began to live together, and for a long time prior and subsequent thereto, they were both Indians to whom allotments had been made of land

upon the Umatilla Indian Reservation, under the Act of Congress hereinbefore mentioned, and were born within the territorial limits of the United States, and each accepted their allotments, and entered upon and *taken* possession thereof, and said Joe Kalyton continued in possession of his allotment from the time it was allotted to him in the year 1891, until he died in January 1898; and that said Louise Kalyton has been in possession of her allotment ever since it was allotted to her in the year 1891, and is now in possession thereof; and that the living together by said Joe Kalyton and Louise Kalyton, as hereinbefore set out in the marriage claimed by the plaintiff in her complaint herein, but that said marriage was not in accordance with the laws of the State of Oregon in force at the time said parties began to live together, or since; that at the time of his death said Joe Kalyton was a resident and citizen of the State of Oregon and died unmarried and without any lineal de-
36 scendants, and left surviving him as his sole and only heir at law, the defendant Mary Kalyton, who is his sister; and that each and all of the other defendants herein, except the defendant Charles Wilkins, as United States Indian Agent, has filed a disclaimer herein of any interest whatever in said lands.

VII.

That said plaintiff Agnes Kalyton, was born in the latter part of the year 1898, and is the illegitimate child of said Joe Kalyton deceased, and has no right, title, or interest in or to the lands allotted to said Joe Kalyton.

VIII.

That plaintiff will, unless restrained by an order of this Court enter upon and take possession of said lands and collect the rents, issues and profits thereof.

And as conclusions of law from the foregoing facts, the Court finds:

I.

That there never was any marriage between said Joe Kalyton, and Louise Kalyton, and that if there had been any such marriage as alleged in the Complaint herein, according to the Custom of the Indians of said Cayuse tribe, said marriage would be void.

II.

That said Agnes Kalyton is not the legitimate child of said Joe Kalyton, and is not the or any, heir at law of said Joe Kalyton, and has no interest in or to the lands allotted to him or any part thereof, or the rents, issues or profits thereof.

III.

That the defendant Mary Kalyton is a sister of said Joe
37 Kalyton, and as such is the sole and only heir at law of said Joe Kalyton and the equitable owner of and entitled to the

immediate possession of all of said lands allotted to said Joe Kalyton together with all rents, issues and profits arising therefrom.

IV.

That a decree should be entered herein declaring said defendant Mary Kalyton to be the sole and only heir at law of said Joe Kalyton, deceased, and as such the equitable owner and entitled to the possession of said lands allotted to him, and restraining the plaintiff from interfering with said lands, and declaring that she has no interest therein whatsoever.

W. R. ELLIS,
Circuit Judge.

Dated this 14th day of July 1902.

And afterwards on the 14th day of July, 1902, the same being the 27th Judicial day of the June term, of said court a Decree was entered on the Journal of said Court in words and figures as follows:

(Title of Court and Cause.)

On this day this cause Coming on for a decree upon the Findings of Fact and Conclusions of Law filed herein on July 14th 1902, based upon said Findings of Fact and Conclusions of Law,

It is now therefore hereby Considered, Ordered and Adjudged and Decreed, that the plaintiff Agnes Kalyton, is not the legitimate child of Joe Kalyton, deceased, and is not the or any heir at law of said Joe Kalyton *of said Joe Kalyton* deceased, and has no interest in or to the lands allotted to him or to the rents issues, or
38 profits, thereof, which lands are hereinafter described; and that the defendant Mary Kalyton is a sister of said Joe Kalyton, and as such, is the sole and only heir at law of said Joe Kalyton, deceased, and the equitable owner and entitled to the possession of all of said lands described as lots six and seven, and the North half of the South East quarter of section 31, in township three North of Range thirty four E. W. M. in Umatilla County State of Oregon, containing one hundred fifty seven (157) acres, together with all the rents issues, and profits arising therefrom; and that none of said other defendants above named has any right, title, or interest in or to said lands, or any part thereof or the rents, profits, or issues arising therefrom, and that said plaintiff be and she is, hereby forever restrained and enjoined from in any wise interfering with said lands or any part thereof, or any of the rents issues, or profits thereof, and that the defendant, Mary Kalyton, have and recover of and from Plaintiff her costs and disbursements herein taxed at $——.

(Signed) W. R. ELLIS,
Circuit Judge.

And afterwards on the 12th day of January, 1903, there was filed in the office of the Clerk of said Court, a notice of appeal in words and figures as follows:—

(Title of Court and Cause.)

To Mary Kalyton one of Defendants in the above entitled suit, and to Hon. T. G. Hailey, her attorney, and to Charles Wilkins, as United States Indian Agent, one of defendants above named:

You and each of you will please take notice that Agnes Kalyton, by Louise Kalyton her Guardian *ad litem,* plaintiff in the above entitled suit, hereby appeals to the Supreme Court of the
39 State of Oregon, from the judgment and decree rendered and entered in said suit wherein, Agnes Kalyton by Louise Kalyton her Guardian *ad litem* is plaintiff, and Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-ta-mop-net, John R. Glascock and Charles Wilkins as United States Indian Agent are defendants, in the Circuit Court of the State of Oregon for Umatilla County, on the 14th day of July A. D. 1902, in favor of defendant Mary Kalyton, and against Agnes Kalyton, by Louise Kalyton plaintiff, in said suit, which judgment and decree is in substance as follows.

"That the Plaintiff Agnes Kalyton is not the legitimate child of Joe Kalyton, deceased and is not the or any heir at law of said Joe Kalyton deceased, and has no interest in or to the lands allotted to him, or to the rents issues, or profits thereof, which lands are hereinafter described, and that the defendant, Mary Kalyton, is a sister of said Joe Kalyton and as such is the sole and only heir at law, of said Joe Kalyton deceased, and the equitable owner and entitled to the possession of all of said lands, described as lots six and seven, and the North half of the South east quarter of section 31, in township three north of range 34 E. W. M. in Umatilla County State of Oregon, containing one hundred and fifty seven (157) acres together with all the rents, issues and profits arising therefrom, and that none of said other defendants above named has any right, title or interest in or to said land or any part thereof, or the rents profits or issues arising therefrom; and that said Plaintiff be, and she is, hereby forever restrained and enjoined from in anywise interfering with said lands or any part thereof, or any of the rents issues or profits thereof, and that the defendant Mary Kalyton, have and recover of and from plaintiff her costs and disburse-
40 ments herein taxed at $—" and from the whole of said judgment and decree.

Dated this 6th day of January 1903.

AGNES KALYTON,
By LOUISE KALYTON,
Her Guardian ad litem, Plaintiff.
H. J. BEAN,
Attorney for Plaintiff.

STATE OF OREGON, *Umatilla County, ss:*

Due and legal service of the within notice of appeal, is hereby admitted and accepted and a copy thereof received and all other and

further service waived at Umatilla County, Oregon, on this 8th day of January A. D. 1903.

T. G. HAILEY,
Attorney for Mary Kalyton,
One of Defendants Within Named.

STATE OF OREGON, *Umatilla County, ss:*

I Charles Wilkins, one of the defendants in the within entitled suit, as United States Indian Agent hereby admit and accept due and legal service of the within notice of Appeal and acknowledge receipt of a copy thereof, and waive all other and further service at Umatilla County, State of Oregon, on this 8th day of January A. D. 1903.

CHARLES WILKINS,
Formerly United States Indian Agent,
Now United States Indian Supt.

And afterwards on the 13th day of January 1903, there was filed in the office of the Clerk of said Court, an undertaking on appeal in words and figures as follows:

41 (Title of Court and Cause.)

Whereas the above named plaintiff Agnes Kalyton by Louise Kalyton her Guardian *Ad Litem,* is desirous of appealing to the Supreme Court of the State of Oregon, from the judgment and decree rendered and entered in said suit wherein Agnes Kalyton by Louise Kalyton, her Guardian *Ad Litem* is plaintiff and Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-ta-mop-net, John R. Glasscock, and Charles Wilkins as United States Indian, — are defendants.

In the Circuit Court of the State of Oregon for Umatilla County, on the 14th day of July 1902 in favor of defendant Mary Kalyton, and against Agnes Kalyton, by Louise Kalyton her Guardian *Ad Litem,* plaintiff in said suit, which judgment and decree is in substance as follows:

"That Plaintiff Agnes Kalyton, is not the legitimate child of Joe Kalyton, deceased, and is not the or any heir at law of said Joe Kalyton, deceased, and has no interest in or to the lands allotted to him, or to the rents, issues, or profits thereof, which lands are hereinafter described, and that the defendant Mary Kalyton is the sister of said Joe Kalyton, deceased, and as such is the sole and only heir at law of said Joe Kalyton, deceased, and the equitable owner and entitled to the possession of all of said lands, described as lots six and seven and the North half of the South East quarter, of section 31 in township three North of Range 34 E. W. M. in Umatilla County, State of Oregon, containing one hundred and fifty-seven (157) acres, together with all the rents issues and profits arising therefrom and that none of said other defendants above named has any right title or interest in or to said lands, or any part thereof, or the rents profits,

or issues arising therefom, and that said Plaintiff be and she
42 is hereby forever restrained and enjoined from in any wise interfering with said lands or any part thereof, or any of the rents issues, or profits thereof, and that the defendant Mary Kalyton have and recover of and from plaintiff her costs and disbursements herein taxed at $—" and from the whole of said judgment and decree.

Now therefore we, Agnes Kalyton by Louise Kalyton, her guardian *Ad Litem,* plaintiff and principal, and R. L. Oliver, surety hereby undertake and promise that the Plaintiff will pay to defendant Mary Kalyton, all the costs damages and disbursements which may be awarded against said plaintiff upon said appeal.

AGNES KALYTON,
By LOUISE KALYTON,
Her Guardian ad litem.
By H. J. BEAN,
Attorney for Plaintiff.
R. L. OLIVER [SEAL.]

STATE OF OREGON, *Umatilla County, ss:*

I, R. L. Oliver, being first duly sworn, say that I am the surety on the foregoing undertaking and that I am a resident and freeholder within the State of Oregon, and that I am worth the sum of two Hundred dollars over and above all my just debts and liabilities, and exclusive of property exempt from execution, and that I am not an attorney or other officer of any Court.

R. L. OLIVER.

Subscribed and sworn to before me this 12th day of January 1903.

H. J. BEAN,
[SEAL.] *Notary Public for Oregon.*

43 STATE OF OREGON, *Umatilla County, ss:*

Due and legal service of the foregoing Undertaking on Appeal is hereby admitted and accepted and a copy thereof received, at Umatilla County State of Oregon, on this 12th day of January 1903.

T. G. HAILEY,
Attorney for Defendant Mary Kalyton.

And afterwards, on the 7th day of February, 1903, there was filed in the office of the Clerk of said Court a motion in words and figures as follows:—

(Title of Court and Cause.)

Comes now the plaintiff above named by H. J. Bean, her Attorney and moves for an order extending the time for filing the transcript in the Supreme Court of the State of Oregon, upon the appeal in the above entitled suit, until the first day of April, 1903, for the reason

that the *such* transcript cannot be prepared within thirty days from taking said appeal.

H. J. BEAN,
Attorney for Plaintiff.

And afterwards on the 7th day of February 1903, the same being the 18th Judicial day of the January Term, of said Court, order was entered on the Journal of said Court in words and figures as follows:—

44 (Title of Court and Cause.)

Now on this day this cause coming on to be heard upon plaintiff's motion for an order extending the time for filing the transcript in the Supreme Court of the State of Oregon, in this cause Plaintiff appearing by H. J. Bean her attorney and the defendant Mary Kalyton appearing by T. G. Hailey Esq., her attorney.

And it appearing to the Court that the transcript in this cause cannot be prepared to file in the Supreme Court within thirty days from the time of taking the appeal herein:

It is therefore hereby ordered and adjudged by the Court that the time for filing the transcript in this suit in the Supreme Court upon the appeal herein, be and the same is hereby extended until the first day of April 1903.

W. R. ELLIS,
Circuit Judge.

Certificate of Transcript.

STATE OF OREGON, *Umatilla County, ss:*

I, W. D. Chamberlain, County Clerk of Umatilla County, State of Oregon, and Exofficio Clerk of the Circuit Court for said County and State do hereby certify that the foregoing transcript of the judgment roll and appeal papers in the case of Agnes Kalyton, by Louise Kalyton, her guardian *ad litem*, plaintiff & appellant *vs.* Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-
45 ta-mop-net, John R. Glasscock, and Charles Wilkins, as United States Indian Agent, defendants and respondents, has been by me compared with the original judgment roll and appeal papers in said case, and that it is a true and correct transcript therefrom, and the whole thereof, including the following papers to-wit: Petition, Order, Oath of Guardian *Ad Litem*, Complaint, Summons, Demurrer, Entry, Order, Motion, Answer, Demurrer, Disclaimer, Reply, Findings of Fact and Conclusions of Law, Decree, Notice of Appeal, Undertaking on Appeal, Motion and Order, as the same appears on file in my office and in my care and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court for said County and State, this 27th day of March 1903.

[SEAL.] W. D. CHAMBERLAIN, *Clerk.*
By B. B. HALL, *Deputy.*

46 AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Appellant,
v.
MARY KALYTON ET AL., Respondent-.

Appeal from Umatilla County; Hon. W. R. Ellis, Judge.

Pendleton, Oregon, November Term, 1903.

Henry J. Bean, for Appellant.
T. G. Hailey, for Respondent.
Moore, C. J.
Reversed.

(Endorsed:) Filed Dec. 14 1903. J. J. Murphy, Clerk, By Arthur S. Benson, Deputy.

47 This is a suit by Agnes Kalyton, a minor, by her mother as guardian *ad litem*, to establish her right to certain real property. The transcript shows that about April 21, 1891, Joe Kalyton, an Indian and a member of the Cayuse tribe, was allotted in severalty 157 acres of land in the Umatilla Indian Reservation. He thereafter lived with the plaintiff's mother and died intestate about January, 1899, seised of the real property allotted to him, and after his death the plaintiff was born. The defendant, Mary Kalyton, his sister, claiming to be his sole heir, took possession of the premises in question and secured the rents therefrom. The complaint, after alleging the facts, in substance, as hereinbefore stated, avers that about 1893, plaintiff's mother married Kalyton according to the customs and laws of the tribe to which they belonged; that thereafter they lived and co-habited as husband and wife, and that plaintiff is the issue of such marriage and the sole heir of the deceased. The answer denies the material allegations of the complaint, and for a further defense avers that the alleged marriage was not performed according to law, and therefore void. For a further defense it is averred that Kalyton and plaintiff's mother being allottees of land in severalty were citizens of this state and that he died unmarried and without lineal descendants. A demurrer to the first separate defense having been overruled, a reply was filed putting in issue the averments of new matter in the answer, whereupon a trial was had resulting in a decree that the defendant, Mary Kalyton, was the sole heir of the deceased, and entitled to the real property of which he died seised, and the plaintiff appeals.

MOORE, *C. J.*:

It is contended by plaintiff's counsel that notwithstanding land in the Umatilla Indian Reservation had been allotted in severalty to Joe Kalyton and also to plaintiff's mother, their tribal relations still exist, and as this testimony shows that they were married ac-

cording to the customs and laws of the tribe to which they belonged, the court erred in refusing to grant the relief prayed for. It is maintained by the defendant's counsel, however, that the testimony shows that plaintiff's mother was incompetent to
48 enter into a legal marriage, and this being so, the plaintiff was not born in lawful wedlock, and hence no error was committed as alleged. The Cayuse Indians were recognized as a tribe by the United States, June 9, 1855, when a treaty was concluded with them and other Indians, which was ratified by the Senate, March 8, 1859, and approved by the President, April 11th of that year, setting apart for their exclusive use certain territory in Oregon which has since been known as the Umatilla Indian Reservation: 12 U. S. Stat. L. 945. An act of Congress, approved March 3, 1885, authorized the President of the United States, with the consent of the Indians, to allot to the Cayuse and other Indians, residing upon the Umatilla Reservation, certain areas of land in severalty, and in addition thereto, to reserve a reasonable amount of pasture and timber lands for their use in common, and also a tract for an industrial farm and school, not exceeding in all 120,000 acres. A commission was created to survey the land and make allottment thereof, which, if approved by the Secretary of the Interior, should thereafter constitute the reservation for the Cayuse and other Indians, and within which the allotments were required to be made. The President was also authorized to cause patents to be issued to all allottees, declaring that the United States held the land so allotted for the term of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment was made, or in case of his death, of his heirs, according to the laws of the State of Oregon, and that at the expiration of that period the United States would convey the premises by patent to the allottee or his heirs in fee, discharged of the trust, and free of all charge or incumbrance whatsoever. The law of alienation and descent in force in this state was made applicable thereto after the issuance of the patents, except as therein otherwise provided: 23 U. S. Stat. L. 340. Section six of an act of Congress, approved February 8, 1887, generally known as the "Dawes Act," providing for the allotment of land in severalty to the Indians on the various reservations, is as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every
49 member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians

therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." 24 U. S. Stat. L. 390. Section five of an act of Congress, approved February 28, 1891, amending and extending the benefits of the act approved February 8, 1887, is, so far as deemed applicable, as follows: "That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have co-habited together as husband and wife according to the custom and manner of Indian life the issue of such co-habitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child." 26 U. S. Stat. L. 794. These excerpts and quotations from the acts of Congress disclose the policy pursued by the United States in dealing with Indians residing upon reservations to whom land has been allotted in severalty, and though these people have been invested with the rights of citizenship and guaranteed the protection of the laws, and rendered amenable thereto,
50 the object evidently intended to be subserved by such legislation was to encourage them to forsake their primitive ways and to adopt a higher civilization. Reforms of this character are necessarily radical and not cheerfully submitted to or acquiesced in by uneducated Indians. The change from savagery to refinement is slow and results from convincing the ignorant of the superior advantages which the latter state affords. The general government, realizing that the task of persuading the older Indians was difficult, has established schools, to teach their children the English branches and to instruct them in the use of tools and implements, thus rendering them self-supporting and partially qualified to compete with the Caucasian race. It is to the younger Indians then, when removed from the influence of the examples of their parents and from the teachings and traditions of their tribes, during the formation of their characters, and when educated in the schools provided for them, that the government must look, to elevate their race. It is quite probable that this conclusion induced the passage of section five of the act of Congress, approved February 28, 1891 (26 U. S. Stat. L. 794), providing that for the purpose of determining the descent of land to the heir of any deceased Indian, that whenever a male and a female Indian shall have co-habited as husband and wife, according to the custom and manner of Indian life, the issue of such co-habitation shall be deemed their legitimate off-spring. Congress thus recognized the validity of Indian marriages, and though the union may have occurred subsequent to the acceptance of an allot-

ment of land in severalty in an Indian reservation, we believe that if the nuptials were celebrated according to the custom of the tribe of which the parties were members or to which one of them belonged, and in pursuance of such union, they have co-habited as husband and wife, the marriage is valid: Johnson *v.* Johnson, 30 Mo. 72; Earl *v.* Godley, 42 Minn. 361; Bank of Austin *v.* Sharpe, 12 Tex. Civ. App. 223; s. c. 33. S. W. 676. In United States *v.* Rickert, 188 U. S. 432, Mr. Justice Harlan, in speaking of persons residing on a reservation to whom allotments of land in severalty had been made thereon, says: "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been dis-
51 charged from that condition" The allotment of a part of a reservation to Indians in severalty does not terminate their tribal relations nor remove them from the supervision and control of the interior department of the general government: United States *v.* Flournoy Live Stock and Real Estate Co., 71 Fed. 576. To reach any other conclusion might, in some instances, thwart the beneficent purpose of the government and transfer the title of land donated by it to induce the elevation of a race, into another channel never contemplated, for if a marriage entered into by members of a tribe, according to the customs thereof, is to be held invalid, and the issue illegitimate, the offspring could never inherit from the father, whose real property, if he had no collateral kinsmen, following the rule of descent in Oregon, would escheat to the State: Laws Or. 1903, p. 127. In McBean *v.* McBean, 37 Or. 195, Mr. Chief Justice Wolverton, in speaking of the tribal relation of an allottee on the Umatilla Indian Reservation, makes use of the following language: "And it is the adjudged policy of the law to treat the Indian tribes who adhere to their peculiar customs, as separate communities or distinct nationalities, with full and free authority to manage their own domestic affairs, and to pursue their own peculiar habits and customs, especially as it concerns the marriage relation. And this is so although their territory is located within the state lines, and the general government manages their affairs through agencies designated for the purposes." In State *v.* Columbia George, 39 Or. 127, the same justice, in discussing the rights of the Indians on that reservation and the paternal exercise of authority over them, further says: "It would seem, therefore, that citizenship, such as extends within the purview of the Dawes Act to Indian allottees, is neither inconsistent nor incompatible with the status of a tribal Indian; that the government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes, indulging them yet a little while, but with greatly restricted authority, in their primitive government."

Though Indians residing on a reservation to whom land
52 therein has been allotted in severalty are classed as citizens and deemed to be subject to the laws of the state, the federal courts only have jurisdiction of grave crimes committed on the reservation by one such Indian against another: State *v.* Columbia George, *supra.* This is an admission that, notwithstanding the allotment, a *quasi* tribal relation still subsists, and that the general government continues to exercise a paternal care over these wards

of the Nation, and until that guardianship is removed, the state courts should not interfere with or disturb the domestic relations of such Indians; but when these relations are involved, it should be the duty of the state courts to determine whether or not they had been entered into or dissolved in accordance with the customs of the tribe. The principal inquiry, therefore, is whether Joe Kalyton and plaintiff's mother were married according to the customs of the Cayuse Indians. Lee Moorehouse, who had been Indian Agent at the Umatilla Reservation, appearing as plaintiff's witness, testified that he had observed the customs of the Indians on that reservation, was asked: "Can you tell the habits of these Indians in regard to marrying, by the Indian custom?" and, over objection and exception, replied: "There doesn't appear to be any regular form they go through in an Indian marriage, and to get married they simply go to living together, as near as I understand it." This witness further says that when these Indians concluded to marry they entered into the agreement by mutual consent and went to living together; that sometimes the man if he had any property purchased his wife, and that he understood the Indians considered their form of marriage as sacred as any other. In Henry *v.* Taylor, 93 N. W. (So. Dak.) 641, it was held that in order to show a marriage between two Indians according to the Indian custom, consisting of an agreement to live together, followed by co-habitation, it was necessary to show an express agreement and pursuant co-habitation, which contract must be evidenced by words disclosing a meeting of minds, uttered in the present tense, for the purpose of establishing the marriage relation. The plaintiff's mother, testifying by an interpreter, says that she lived with Joe Kalyton as his wife five years immediately
53 prior to his death; that they were not married by any regular custom; that he asked her if she would live with him and she consented; that the young and the old Indians are married in that manner; and that it is an old custom and she could not tell when it commenced. The testimony of this witness is corroborated by that of Joe Allen, who says that Kalyton and plaintiff's mother lived together as other Indian husbands and wives belonging to that tribe. The defendant, Mary Kalyton, testifies that her brother and plaintiff's mother lived together as husband and wife according to the Indian customs, in speaking of which she says she was first married in that manner and lived with her husband one summer, and that they were thereafter married according to the laws of this state. We think the testimony clearly shows a valid and subsisting custom of the Cayuse tribe of Indians in observing which Kalyton and plaintiff's mother entered into an express agreement, evidenced by words disclosing a meeting of their minds, followed by co-habitation, and, under the rule announced, established the existence of a valid marriage.

It is maintained by defendants' counsel, however, that plaintiff's mother was not competent to enter into a marriage contract at the time or after she commenced living with Kalyton and this being so plaintiff's illegitimacy is established and no error was committed in decreeing the real property of which he died seized to his sister as

his sole heir. The testimony shows that plaintiff's mother had lived with the following named Indians as the wife of each respectively, to-wit: Ish-lo-wal-ko, White Wolf and Top-la-won. The transcript does not show whether or not the first named person is dead, but it discloses that the others were living during all the time she lived with Kalyton, Top-la-won having re-married. The plaintiff's mother testifies that she was married to these persons in the Indian manner and that she ceased to live with and separated from each according to the custom of her tribe. The following question was propounded to the interpreter: "Ask her if she separated or was divorced from White Wolf and these other Indians according to Indian custom, the same as Indians always separated?" and she answered through
54 him as follows: "Yes, sir; separated in the Indian way." No evidence was offered, tending to show how an Indian divorce is secured, and it is argued by defendants' counsel that the testimony of plaintiff's mother is the mere statement of a legal conclusion and insufficient to establish the probative facts of the dissolution of the marital relation according to the Indian custom. The legal principle insisted upon would ordinarily be sufficient to defeat the plaintiff's right of recovery, but in the present instance we do not think the rule invoked applicable, for in settling the pleadings the court having held that after the allotment of land in severalty a marriage according to law was a prerequisite to the legitimacy of the issue of co-habitation, the subordinate question of the capacity of plaintiff's mother to enter into a marriage contract with Kalyton was not given that degree of attention which its importance demanded. No objection was interposed to the questions propounded to her in relation to her separation from her prior husbands nor was she cross-examined as to the customs of her tribe in the manner of securing divorces, in view of which we believe the testimony was sufficient to show that she was divorced from them and was capable of entering into a valid marriage with Kalyton.

It is contended by defendants' counsel that the plaintiff was not born within the period of gestation after the death of Kalyton and hence no error was committed in rendering the decree complained of. The testimony shows that Kalyton died, as plaintiff's mother testified, a "few days" after the New Year, and that her daughter was born, "late in the fall; the time the leaves fall off the trees"; that the witness did not know the name of the months but that plaintiff was born about one month before Christmas, and at the trial her age was "four snows." When it is considered that the knowledge of plaintiff's mother concerning the year seems to be limited to the holidays and that a "few days" or "one month" are to her vague and indefinite terms, we beli-ve her testimony that Kalyton was the father of her daughter to be true without discussing the question of how long gestation might be protracted. No testimony having been
55 offered tending to show that plaintiff's mother was dissolute, we conclude that her daughter, the plaintiff herein, was born in lawful wedlock and is the sole heir of Joe Kalyton, deceased, and as such, entitled to the possession of the real property of which he died seised.

The decree will therefore be reversed and one entered here in accordance with this opinion.

56 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court-room in the City of Salem, on the first Monday, the 5th day of October 1903,

Present: Hon. Frank A. Moore, Chief Justice, Hon. Charles E. Wolverton, Associate Justice, Hon. Robert S. Bean, Associate Justice, and J. J. Murphy, Clerk, the following proceedings were had on Monday the 14th day of December 1903, the same being the 35th judicial day of said term:

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Appellant,

vs.

MARY KALYTON, Respondent.

Appeal from Umatilla County.

This cause having heretofore to-wit: on the 5th day of November 1903, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration and the court having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon, and being now fully advised in the premises finds that there is error as alleged. It is therefore Considered, Ordered and Decreed that the decree in this cause in the court below rendered be and the same hereby is in all things reversed and set aside.

And it appearing to the court and the court further finds: That on or about the — day of January 1898, Joe Kalyton died intestate in Umatilla County State of Oregon, seized and possessed of the following described real estate, to-wit: Lot six (6) and seven (7) and the North half of the Southeast quarter of Section Thirty one (31) in Township Three (3), North of Range Thirty four (34)

57 East of the Willamette Meridian, in Umatilla County, State of Oregon, being a part of the Umatilla Indian Reservation, and containing One hundred and fifty seven (157) acres, which lands were duly allotted to Joe Kalyton on or about the 21st day of April 1891 by the Government of the United States of America, under and by virtue of the provisions of an Act of Congress entitled, "An Act providing for the allottment of land in severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes," which said Act was approved March 3, 1885, and the amendments thereto, which said allottment was duly approved by the Department of the Interior of the United States of America on the 21st day of April 1893.

That on or about the year 1893, said Joe Kalyton and Louise Kalyton were duly married at the Umatilla Indian Reservation in accordance with the customs and laws of the Cayuse tribe of Indians of which they were members, and residing on said Umatilla Indian

Reservation, and thereafter lived and cohabited together as husband and wife for a period of about five years, and that said Agnes Kalyton is the only and lawful issue of said marriage and cohabitation, and is the sole heir at law of said Joe Kalyton, deceased.

That said appellant Agnes Kalyton, is entitled to have all of said land of said Joe Kalyton, deceased, descend to her, and is entitled to have the immediate possession, and the present use and the rents, issues and profits thereof.

It is now therefore further considered, ordered and decreed that the appellant Agnes Kalyton be and she is hereby declared to be the legal, sole and only heir at law of said Joe Kalyton deceased,
58 and as such is the owner of and entitled to the possession of the Lots six (6) and seven (7) and the North half of the Southeast quarter of section thirty one (31) in Township Three (3) North, of Range Thirty four (34) East of the Willamette Meridian, in Umatilla county, State of Oregon, which said lands were allotted to said Joe Kalyton under and by virtue of an Act of Congress entitled "An Act providing for the Allotment of lands in severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes;" which said Act was approved March 3d 1885, and the amendments thereto; and is entitled to all the rents, issues, and profits thereof, and that said Respondent Mary Kalyton has no right, title or interest in or claim to or upon said lands, or any part thereof.

It is further considered, ordered and decreed that the appellant recover of respondent her costs and disbursements in this court upon the appeal allowed and taxed at $98.90 and her costs and disbursements in the court below to be there taxed.

It is further ordered that the cause be remanded to the said court below and that a decree be there entered and docketed in accordance herewith.

59 AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Appellant,

vs.

MARY KALYTON ET AL., Respondents.

Reversed, December 14, 1903, (74 Pac. 491).

On Petition for Rehearing.

Moore, C. J.
Denied.

(Endorsed:) Filed Oct. 17, 1904, J. J. Murphy, Clerk, By Arthur S. Benson, Deputy.

60 MOORE, *C. J.*:

A petition for a rehearing having been filed, it is contended that this suit was instituted to determine, in effect, the title and right to the possession of public land, thereby necessarily rendering the

United States a party; but that this cannot be done by a state court, and hence the decree rendered herein is *coram non judice* and void. The legal principle now insisted upon was not discussed by counsel at the trial in this court, but as jurisdiction of subject-matter cannot be conferred by consent, is never waived, (B. & C. Comp., §72), and may be invoked for the first time on appeal, (Evarts *v.* Steger, 5 Or. 147), it becomes necessary to consider the question presented.

The act of Congress, approved March 3, 1885, (23 Stat. 340) providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Reservation in this State and prescribing the quantity to be distributed to each person of the various classes, contains the following clause: "The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided."

An examination of the language quoted will show that though
61 the issuance of two patents is contemplated, it is evident that the first specified in the act was intended to be nothing more than a certificate or written memorandum, to evidence the selection of the land allotted and to declare the trust reserved: United States *v.* Rickert, 188 U. S. 432. In our opinion the word "descent" in the clause stipulating "that the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have been executed," etc., was intended to render the transmission of an estate by inheritance applicable to the land allotted to an Indian from the time such certificate was issued. The word "alienation" usually means the act by which the title to real property is voluntarily transferred by one person to, and accepted by another, and such act is generally accomplished by the execution of a deed or of a will: Burbank *v.* Rockingham etc. Ins. Co., 24 N. H. 550. As an Indian cannot voluntarily transfer the title to the land allotted to him, until the final patent is issued, it is evident that the word alienation was not used in the act under consideration in its technical sense. It is quite probable, however, that until the title is transferred, an Indian allottee has no estate in the premises, and that his heirs take as donees of the United States and not by inheritance from him. The act having provided that after the expiration of twenty-five years from the time of the allotment "the United States will convey the premises by patent" to the allottee or his heirs, "in fee," etc., the final patent when issued will invest the allottee with an estate in the land that he can "alienate" or "devise," and as these quoted words were not necessary in the grant of a fee, they, in our opinion, are limited

to the first patent issued. The law of descent of this state being applicable on the death of an Indian allottee,
62 after the primary patent or certificate is issued, has a state court jurisdiction of the subject-matter, and is its decree, determining the heirs in such cases, valid? So long as the United States holds the lands in trust for Indian allottees, the title thereto remains in the general government, (United States *v.* Rickert, 188 U. S. 432), and the question as to whether or not a final patent therefor shall issue, is to be determined by the Secretary of the Interior, thereby depriving state courts of all jurisdiction of the subject-matter; Musgrove *v.* Harper, 33 Or. 252; Moore *v.* Robbins, 96 U. S. 530; United States *v.* Schurz, 102 U. S. 378. If this were a suit to enforce the trust reserved, the United States would be an indispensable party (31 U. S. Stat. 760, c. 217; Pomeroy, Remedies, § 356; Tucker *v.* Silver, 9 Iowa 261; Hy-yu-tse-mil-kin *v.* Smith, 194 U. S. 401) and as this cannot be done by a state court, the decree rendered herein would be void. The determination by a state court of the heirs of a deceased Indian allottee is not, in our opinion, an execution of the trust: Bird *v.* Winyer, 24 Wash. 269; Bird *v.* Terry, 129 Fed. 472. The finding of such fact is not an interference with the primary disposal of the soil but is in aid of the general government in protecting the rights of its *cestui que trust.* Thus, in Kitcherside *v.* Myers, 10 Or. 21, it was held that where a person had taken the initiatory steps to secure the title to public land and received from the proper officers the necessary evidence thereof, he was entitled to the possession of the premises selected and for any interference therewith by another without legal title or equal equitable claim, a state court, upon application of the entryman, would put him in possession of his rights. The rule is settled in this state that a person entitled to the possession of land the title to which
63 is in the United States, will be protected in his right by our courts, when his possession has been unlawfully disturbed by another: Jackson *v.* Jackson, 17 Or. 110; Hindman *v.* Rizor 21 Or. 112; Allen *v.* Dunlap, 24 Or. 229; Bishop *v.* Baisley 28 Or. 119; Pacific Live Stock Co. *v.* Gentry, 38 Or. 275; Browning *v.* Lewis, 39 Or. 11; Moore *v.* Halliday, 43 Or. 243. In the case at bar, Joe Kalyton was entitled, during his lifetime, to the possession of the land allotted to him and upon his death, his heirs, under the law of descent in this state, succeeded to his right in the premises. This possession having been disturbed by one who is not his successor in interest or estate, according to such law, the rule established in this state makes it incumbent upon our courts, in aid of the beneficent policy adopted and pursued by the general government in caring for the Indians and in trying to promote their civilization, to declare by solemn decree who is his legal heir.

It is argued, however, that unless the Indian Agent in charge of the Umatilla Reservation voluntarily surrenders to the plaintiff the possession of the premises allotted to the deceased, it will be impossible to enforce the decree herein. It is the duty of the court to declare the law involved in causes submitted irrespective of the consequences that may result therefrom, and having faithfully discharged that

obligation according to law, as we understand it, we are compelled to adhere to the opinion heretofore announced, leaving the enforcement of the decree to the person in whose favor it was rendered.

It follows that the petition should be denied, and it is so ordered.

64 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday, the 2nd day of October 1905 Present: Hon. Robert S. Bean, Chief Justice, Hon. Frank A. Moore, Associate Justice, Hon. Thomas G. Hailey, Associate Justice, and J. J. Murphy, Clerk, the following proceedings were had on Friday the 8th day of December 1905, the same being the 28th judicial day of said term:

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Appellant,

vs.

MARY KALYTON, Respondent.

Appeal from Umatilla County.

It appearing to the court from the affidavit of R. J. Slater attorney for the said respondent Mary Kalyton, that since this cause was decided herein upon appeal the said Mary Kalyton died leaving surviving her as her only and sole heir at law one Wm. McKay who is now the only and real party in interest as defendant and respondent herein.

It is now ordered by the court upon motion of the said R. J. Slater that the said William McKay be and he is hereby appointed and substituted in the place and stead of said Mary Kalyton as defendant and respondent in this cause.

65 In the Supreme Court of the State of Oregon.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY, Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Specifications of Error.

Now comes the above named defendants and files herewith their Petition for a Writ of Error and say that there are Errors, in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of Errors:

1. The Supreme Court of the State of Oregon, erred in holding and deciding that the marriage between Joe Kalyton and Plaintiff's

(Defendant in Error) mother according to the customs of the Cayuse Indians which was consummated after the Act of Congress of February 8th 1887, commonly called the "Daw-s Act" (24 Stat. U. S. 390, c. 119, Sec. 6, 3rd Fed. St. Ann. 496), was a lawful union under the Act of Congress of February 28th, 1891.

2. In holding and deciding that the Courts of the State of Oregon had jurisdiction of the subject matter of this suit and in not holding that the United States Circuit Court for the District of Oregon, had exclusive jurisdiction thereof.

3. In holding and deciding that the United States Government as Trustee for said defendants is not an indispensable party to this suit.

R. J. SLATER,
Attorney for Defendants, Plaintiffs in Error.

(Endorsed:) In the Supreme Court of the State of Oregon, October Term 1905. Agnes Kalyton by her guardian *ad litem* Louise Kalyton, Plaintiff, *vs.* William McKay *et al.*, Defendants. Specifications of Error; Filed Dec. 8, 1905, J. J Murphy, Clerk; By Arthur S. Benson, Deputy.

66 In the Supreme Court of the State of Oregon.

AGNES KALYTON, — LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY, Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, Mrs. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Prayer for Relief.

For the errors assigned the defendants pray the Judgment and decree of the Supreme Court of the State of Oregon in the above entitled cause be reversed, and a judgment and decree for the defendant and for costs.

R. J. SLATER,
Attorney for Defendants.

(Endorsed:) In the Supreme Court of the State of Oregon; Agnes Kalyton &c. Plaintiff, *vs.* William McKay *et al.* Defendants, Prayer for Relief; Filed December 26th 1905, J. J. Murphy, Clerk; By Arthur S. Benson, Deputy. R. J. Slater, Attorney for Def'ts.

67 In the Supreme Court of the State of Oregon.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY, Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Petition for Writ of Error.

To the Honorable Robert S. Bean, Chief Justice of the Supreme Court of Oregon:—

The defendants in the above entitled suit, most respectfully represent and say:

That on the 14th day of December 1903, a final decree and judgment in this suit was entered by the Supreme Court of the State of Oregon, said decree and judgment being against the defendants and in favor of the above named plaintiff by which said decree and judgment these said defendants were aggrieved in that said judgment and decree and the proceedings had there*to* in this case certain errors were committed to the prejudice of these defendants, all of which errors will appear more in detail from the Assignment of Errors filed with this Petition.

Wherefore defendants pray that a Writ of Error may issue to the United States Supreme Court, directed to the Supreme Court of the State of Oregon, for the Errors complained of, and that a duly authenticated transcript of the proceedings herein be sent to the said Supreme Court of the United States.

R. J. STATER,
Attorney for Defendants.

68 STATE OF OREGON, *Supreme Court, ss:*

Let the Writ of Error issue upon the execution of a Bond by William McKay with sufficient sureties in the sum of One Thousand Dollars ($1,000.00) said bond when approved to act as a supercede-s.

Dated this 8th day of December A. D. 1905.

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

69 [Endorsed:] No. —. In the Supreme Court of the State of Oregon October Term, 1905 Agnes Kalyton, by Louise Kalyton her guardian, *ad litem* Plaintiff *vs.* William McKay *et al.* Defendants Petition for Writ of Error. Filed Dec. 8 1905 J. J. Murphy, Clerk; By Arthur S. Benson, Deputy.

70 In the Circuit Court of the State of Oregon for Umatilla County.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, Mrs. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Bond on Writ of Error.

Know all men by these presence: That we, William McKay, as principal and William Caldwell as surety are held and firmly bound in the sum of $1000. unto the above named plaintiff, her heirs, administrators and executors, to be paid to the said plaintiff, her heirs, administrators or executors, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our *selas* and dated this 2" day of December 1905.—

Whereas: The above named William McKay has sued out a Writ of Error to the Supreme Court of the United States, to reverse the decree in the above entitled cause by the Supreme Court of the State of Oregon.—

Now therefore, the condition is such, that if the above named William McKay shall prosecute said writ to affect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

WILLIAM McKAY.
WILLIAM CALDWELL.

71 STATE OF OREGON, *Umatilla County, ss:*

I, William Caldwell, being first duly sworn say: That I am the surety above named; and that I am a resident householder and freeholder within the State of Oregon, and am worth the sum of $2000 over and above all my just debts and liabilities and exclusive of property exempt from execution.

In witness whereof, I have hereunto set my hand this 4th day of December 1905.

WILLIAM CALDWELL.

Subscribed and sworn to before me this 4th day of December 1905.
[SEAL.] DAN P. SMYTHE,
Notary Public for Oregon.

STATE OF OREGON, *Umatilla County, ss:*

I, Robert J. Slater being first duly sworn on my oath, say: That I have made a diligent search and inquiry concerning the amount

of property real and personal and its value owned by William Caldwell the person whose name is subscribed to the foregoing undertaking and bond, and as a result of such investigation, believe him to be safely worth the sum of $2000, over and above all just debts and exclusive of property exempt from execution.

R. J. SLATER.

Subscribed and sworn to before me this 8th day of Dec. 1905.

[SEAL.] ARTHUR S. BENSON,
Notary Public for Oregon.

72 STATE OF OREGON, *Supreme Court, ss:*

The foregoing bond was submitted to and approved by me this 8th day of December A. D. 1905.

R. S. BEAN,
Chief Justice.

(Endorsed:) In the Supreme Court of the State of Oregon, October Term 1905; Agnes Kalyton by Louise Kalyton her guardian *ad litem*, Plaintiff, *vs.* Mary Kalyton, *et al.* Defendants; Bond. Filed Dec. 8, 1905, J. J. Murphy, Clerk; By Arthur S. Benson, Deputy.

73 In the Supreme Court of the United States.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY, Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oregon, before the Honorables Charles E. Wolverton, Robert S. Bean, and Frank A. Moore, between Agnes Kalyton, by Louise Kalyton her guardian *ad litem* Plaintiff and Defendant in Error, and William McKay, substituted for Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-ta-mop-net, John R. Glasscock, and Chas. Wilkins as United States Indian Agent, Defendants and Plaintiffs in Error, a manifest error hath happened to the great damage of said Plaintiffs in Error, as by — complaint doth appear, and We being willing that error, if any

hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, *and* in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 9th day of December, A. D. 1905.

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the United States Circuit Court
for the District of Oregon.

Allowed.
R. S. BEAN,
Chief Justice of the Supreme Court
of the State of Oregon.

74 [Endorsed:] No. —. In the Circuit Court of the United States for the District of Oregon. Agnes Kalyton *vs.* William McKay *et al.* Writ of Error to the Supreme Court of the United States. Filed Dec. 11, 1905. J. J. Murphy, Clerk.

75 In the Supreme Court of the State of Oregon.

AGNES KALYTON, by LOUISE KALYTON Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Citation.

UNITED STATES OF AMERICA, *District of Oregon, ss:*

To Agnes Kalyton, by Louise Kalyton her guardian *ad litem* and H. J. Bean her Attorney, The President of the United States send Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States to be held at Washington, within sixty days from the date hereof pursuant to a Writ

of Error filed in the Clerk's Office of the Supreme Court of the State of Oregon, wherein Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-ta-mop-net, John R. Glascock, and Chas. Wilkins as United States Indian Agent and William McKay substituted defendant for Mary Kalyton deceased, are Plaintiffs in Error and Agnes Kalyton by Louise Kalyton her guardian *ad litem* are Defendants in Error, to show cause if any there be why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oregon, this 12th day of December, 1905.

[Seal Supreme Court, State of Oregon.]

R. A. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:
J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

76 PENDLETON, UMATILLA COUNTY, OREGON,
December 14th, 1905.

I, Attorney of Record for Defendant in Error in the above entitled suit, hereby acknowledge due service of the above Citation and enter an appearance in the Supreme Court of the United States.

H. J. BEAN,
Attorney for Defendants in Error.

[Endorsed:] No. ——. In the Supreme Court of the State of Oregon. October Term, 1905. Agnes Kalyton, by Louise Kalyton her guardian *ad litem*, Plaintiff, *vs.* William McKay *et al.*, Defendants. Citation. Filed Dec. 16th, 1905. J. J. Murphy, Clerk.

78 In the Supreme Court of the State of Oregon.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*,
Plaintiff,
vs.
WILLIAM MCKAY, Substituted for MARY KALYTON Deceased *et al.*,
Defendants.

I, J. J. Murphy, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said suit filed with our said Court on appeal from the decree of the circuit court of the State of Oregon for the County of Umatilla from which the said appeal was taken, and is the record upon which said appeal was heard, and the decree of the supreme court entered thereon on the 14th day of December 1903.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the decree of our said Supreme Court upon the said appeal entered on the said 14th day of December 1903,

and a full, true and correct copy of the opinion of the court filed on said 14th day of December 1903, and upon which said decree was entered. Also a full, true and correct copy of the opinion of the court denying the Respondent's Petition for a Rehearing, filed October 17, 1904, a correct copy of the order of said court substituting Wm. McKay as defendant herein.

I further certify that the Petition for a Writ of Error in said cause and the endorsement thereon; the Writ of Error and Allow-
79 ance thereof and the endorsements, and the Citation with acceptance of service and endorsements thereon, all of which are attached to the above and foregoing, are the original Petition, Writ of Error and Citation lodged and filed with me; and I do certify that the foregoing copy of bond, its approval and endorsements thereon, prayer for relief and endorsements thereon, and the specification of errors are true and correct copies of such originals lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said Court as the same appears of record and on filed in my office.

I further certify that the cost of the foregoing return to the Writ of Error is $27.00 and that said amount was paid by R. J. Slater Attorney for Plaintiffs in Error.

In witness whereof, I have hereunto set my hand and seal of the Supreme Court of the State of Oregon, at my office in the City of Salem, in said State this 4th day of January 1906.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

Return to Writ.

UNITED STATES OF AMERICA, *Supreme Court of Oregon, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the above entitled cause, with all things concerning the same.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court
of the State of Oregon.

Endorsed on cover: File No. 20,045. Oregon supreme court. Term No. 181. William McKay (substituted for Mary Kalyton) *et al.*, plaintiffs in error, *vs.* Agnes Kalyton, by Louise Kalyton, her guardian *ad litem*. Filed January 12th, 1906. File No. 20,045.

FILE COPY.

BRIEF OF PLAINTIFF

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1906.

Office Supreme Court,
FILED.
JAN 8 1907
JAMES H. McKENNEY
CLERK

NO. 181

WILLIAM McKAY (SUBSTITUTED FOR MARY KALYTON) ET AL., PLAINTIFF IN ERROR,

vs.

AGNES KALYTON, BY LOUISE KALYTON, HER GUARDIAN *AD LITEM*.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

T. G. HAILEY,
R. J. SLATER,
Attorneys for Plaintiff in Error.

Filed_____

East Oregonian Pub. Co.
Pendleton, Oregon

SUPREME COURT

of the

UNITED STATES.

October Term, 1906.

No. 181

WILLIAM McKAY (SUBSTITUTED FOR MARY KALYTON) ET AL., PLAINTIFF IN ERROR,

vs.

AGNES KALYTON, BY LOUISE KALYTON, HER GUARDIAN *AD LITEM*.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

STATEMENT OF CASE.

This is a suit commenced in the circuit court of the State of Oregon for Umatilla County by the plaintiff, a minor, through her mother, Louise, an Indian woman, as guardian *ad litem*, to determine plaintiff's right to certain lands allotted to one Joe Kalyton, deceased, upon the Umatilla Indian Reservation in Oregon, under the act of Congress of March 3, 1885, providing for allotments on such reservation. The plaintiff claims to be the daughter of said Joe Kalyton, while defendant, (who has since died and is now represented by her heir) was a sister. In April, 1891, Joe Kalyton and

the plaintiff's mother Louise, both being Indians born within the territorial limits of the United States, received separate allotments upon the Umatilla Indian Reservation under the act above mentioned. Kalyton then had a wife with whom he was living and from whom he was afterwards divorced, and Louise had lived as wife with two or three different Indians and had never been divorced from any of them. In 1893, about two years after the allotment had been made, Kalyton and Louise began to live together, and Louise claims that this was a marriage according to the customs of their tribe. They thereafter cohabited for about five years, when Kalyton died, about the first of January, 1899, and the plaintiff was born the following fall, as Louise says, "before Christmas, about when leaves begin to fall." Defendant, however, claims that they were never married by custom or otherwise, and that their cohabitation was meretricious throughout. A demurrer questioning the jurisdiction of the state court over the subject matter of the suit was overruled, and after a trial upon the issues a decree was rendered in favor of defendant, which held that Kalyton and Louise being allottees were citizens, and there could be no marriage under the Indian custom between them. From which decree the plaintiff appealed to the supreme court of the State of Oregon, where the decree of the lower court was reversed and a decree entered in favor of the plaintiff declaring her to be the daughter and sole heir of Kalyton, deceased, and as such, entitled to the allotment made to him; and holding also that such marriage was valid for the reason that both Kalyton and Louise were not citizens in the full sense and tribal customs still prevailed among their people. A careful reading of the opinion of the supreme court will disclose that it was based upon the erroneous idea that Indians to whom allotments have been made are still wards of the government, and that allotted lands upon an Indian reservation held by the United States as trustee, have the same legal status as public lands of the United States. Under the pleadings in this case three facts are admitted which we regard under the decisions of this court as fatal to the plaintiff's contention. First, the subject matter of this suit is the right to an allotment of lands upon an Indian reservation, the title to which lands is held by the government of the United States as trustee. See-

ond, the alleged parents of the plaintiff were allottees under the act of March 3, 1885, providing for the allotment of lands upon the Umatilla Indian Reservation, at the time they were married in 1893. Third, the marriage, if any, between said parties, was according to the custom of the Indian tribe to which they belong, and not in accordance with the laws of the State of Oregon.

The first question presented by this appeal, then, is whether or not the state court had jurisdiction of the subject matter of this case. In other words, whether the state courts have jurisdiction to hear and determine controversies over the right to allotments upon an Indian reservation the title to which lands is held in trust by the government of the United States. And, second, whether or not, under the terms of the general allotment act of February 8, 1887, commonly known as the Daws act, Kalyton and Louise, the alleged parents of plaintiff, were citizens of the State of Oregon and as such subject to all its civil laws, including that of marriage. The contention on the part of plaintiff in error herein is that the state courts have no jurisdiction over allotted lands as long as the title thereto is held in trust by the government for the benefit of the allottee, and that all Indians born within the territorial limits of the United States, to whom allotments have been made under any law or treaty, thereby become citizens of the United States and of the state or territory in which they reside, and subject to all the laws both civil and criminal of such state or territory, and that tribal customs are thereby abolished and marriages and divorces must thereafter be in accordance with the state law. In support of this contention are cited the following:

POINTS AND AUTHORITIES.

I.

The legal title to the lands involved in this suit is in the United States as trustees for twenty-five years for the allottee, or in case of death, his heirs.

Act March 3, 1885, 53 Stat. 340.

II.

The only authority for such suit as this is the act of Congress of August 15, 1894, 28 Stat. 305, which confers jurisdiction therefor upon the United States circuit courts, and such jurisdiction is exclusive.

Act Aug. 15, 1894, 28 Stat. 305.
Patawa v. U. S., 132 Fed. 894.
Parr v. U. S., 132 Fed. 1004.
Smith v. U. S., 142 Fed. 226.
Wisconsin Ry. Co. v. Price County, 133 U. S. 496-504.

III.

Prior to the passage of the act of August 15, 1894, *supra*, the authority to determine the rights of claimants to allotments upon the Umatilla Indian Reservation was vested in the Secretary of the Interior.

Act March 2, 1885, 23 Stat. 340.
Mosgrove v. Harper, 33 Or. 252.

IV.

Indians born within the territorial limits of the United States to whom allotments have been made, are citizens of the United States, and of the state or territory where they may reside, and subject to and entitled to the benefits of all the laws, civil and criminal, of such state or territory.

Act. Feb. 8, 1887, Sec. 6, 24 Stat. 388.
Boyd v. Thayer, 143 U. S. 135-162.
In re Haff, 197 U. S. 488-509.
State ex rel v. Denoyer, 6 N. Dak. 286.
State ex rel v. Norris, 37 Neb. 299.
In re Now-Ge-Zhuck, 69 Kans. 410.

V.

Such Indian allottees are subject to the laws of the state in which they may reside governing their marriage relations.

Moore v. Wa-Mc-Go, 83 Pac. 400.

ARGUMENT.

The questions presented to this court by this case, are very important, and demand the greatest care and consideration, since, the principles to be settled are new, and will affect, largely, almost every Indian in the United States, who has had lands allotted to him in severalty.

All the questions involved are federal questions, and can not be fairly and authoritatively settled in the state courts. A careful reading of the decision of the Supreme Court of the State of Oregon in this case, and the decisions of the United States Court for the District of Oregon, shows a wide and almost irreconsilable conflict in the construction and applications of the laws of the United States to the Indians. That, doubtless, was the prime motive in congress confering exclusive jurisdiction upon the U. S. Courts, in such cases.

We are willing to concede to the Indian, personally, all the rights, privileges and immunities of citizens of the United States, and the state of Oregon (Act. of Con. Feb. 8, 1887, Sec. 6, 24 Stat. 288.) Personally he is emancipated, (In re Huff 197, U. S. 488, 509,) when he has accepted an allotment and is no longer a ward of the United States; but in conferring so much liberty upon the Indian, Congress was carefu to retain for his protection, the title to his lands, and did not either expressly, or impliedly surrender the jurisdiction of the same to the state courts, or to state jurisdiction, (U. S. vs. Rickarts, supra.) This jurisdiction was expressly conferred upon the United States courts by act of Congress August 15, 1894, 28 Stat. 305, and it must rest there until it is changed by Congress or until the title finally passes from the United States.

The Supreme Court of the State of Oregon in its opinion in this case based the right of jurisdiction over the subject matter in the state court upon the question of right of possession and occupancy only, and cites in support thereof several cases of that court which hold in effect that a claimant of public lands having complied with the requirements of law entitling him to possession for the purpose of perfecting his claim and acquiring title thereto from the government, can maintain proper proceedings in the state court to protect his right of possession for the purposes mentioned, although the legal title may still be in the United States. This is undoubtedly just and sound law; but it has no application to the case at bar.

It has been held by this court that where there is a conflict of claimants to the title to land, the legal title to which is still held by the United States, neither state nor federal courts will entertain jurisdicion to determine such conflict. Moore v. Robbins, 96 U. S. 530; U. S. v. Schurz, 102 U. S, 378. Such is the question in this case and even the federal court would not now have jurisdiction herein were it not specially conferred by the act of Congress of August 15, 1894. Sloan v. U. S., 95 Fed. 193. Each of the litigants herein claims the right to the possession and beneficial use of the land involved as owner of the equitable title thereto, the legal title being in th government to be conveyed to the true equitable owner when the trust period has expired. The question in issue here is which claimant shall receive such legal title when the trust has ended, and the right to present possession and occupancy is dependent upon that issue. It is not a question of one lawfully entitled to possession being unlawfully disturbed by one with no right to possession; but a case, which of two claimants to title has the better right, and the question involved is entirely within the scope of the act of August 15, 1894, conferring jurisdiction upon the United States circuit court where a person of Indian blood or descent claims a right to an allotment from which he has been excluded or denied.

The cases cited in the opinion of the Oregon Supreme Court of Bird v. Winyer, 24 Wash. 269 and Bird v. Terry, 129 Fed. 472, have no application to the case at bar for the reason that in both of

these cases the legal title to the lands involved had passed from the government to the allottee. In the case at bar the legal title is still in the government and the question is who shall receive such title when the trust period has expired? The word "heirs" is mere description of the donees, who take directly from the government in the event of the allottee's death during the trust period, as they did under the old Oregon Donation Land Act of 1850. Davenport v. Lamb, 80 U. S. 418; Hall v. Russell, 101 U. S. 502. The allottee in this case having died, the question is which if the litigants is entitled to the lands involved as donee of the government. It is purely a question of title. Not a question of right to possession to perfect title; but a question of right to present possession based upon present right to the legal title to be acquired without any act of occupancy or otherwise to be performed to perfect such title. Such being the case, it is a dispute as to title to lands held by the United States and the state court has no jurisdiction thereof. Moore v. Robbins, *supra;* U. S. v. Schurz, *supra.*

Further, the assumption of jurisdiction of the state courts to determine who is entitled to such land when the legal title is still in the United States would be an interference with the primary disposal of the soil of this state, which is contrary to the terms of the enabling act admitting the State of Oregon into the Union, and an interference with the regulations of Congress for securing the title to said soil to bona fide purchasers thereof. Act of Congress February 14, 1859, and of the legislative assembly of the State of Oregon June 3, 1859; which latter act reads as follows:

"Be it ordained by the legislative assembly of the State of Oregon that the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title to said soil to the bona fide purchasers thereof; and that in no case shall non-resident proprietors pay taxes higher than residents; and that said state hsall never tax the land or property of the United States within the said state."

Prior to the allotment of lands in severalty upon the Umatilla

Indian Reservation such reservation was Indian country and the title to the lands therein were within the exclusive jurisdiction of the United States, and by the allotment act under which the lands in controversy were allotted a portion of said reservation was allotted in severalty to the Indians in common for grazing and pasturage purposes, reserving title, however, in the United States as trustee, and we fail to see where, so far as the title to the lands is concerned, the status of the reservation is changed from what it was prior to the allotment. Then the government held the legal title for the benefit of the Indians in common; since the allotment it has held the legal title to the allotments for the benefit of the Indian allottees, and of the grazing lands for the benefit of the Indians in common, with the proviso that at the end of twenty-five years title to the individual allotments shall vest in the allottees, or in case of their death, in their heirs by conveyance from the United States. Based upon this right of legal title to the land allotted, the United States in the case of U. S. v. Rickert, *supra*, has successfully asserted its right to prevent the assessment of permanent improvements upon allotted lands, and in the numerous cases growing out of the leasing of lands, upon the Winnebago Reservation in Nebraska without the consent of the Secretary of the Interior, has maintained its right to invoke the aid of the court to restrain persons from securing leases from the Indians on said reservation other than such as are authorized by law. U. S. v. Flournoy Live Stock Co., 69 Fed. 886, and 71 Fed. 576. And in the case of U. S. v. Gardner, 133 Fed. 285, it was held that the title to allotted lands upon the Colville Reservation in the State of Washington remained in the United States and it could recover from a person the value of timber unlawfully cut and removed from such allotted lands. These cases, we think, clearly establish the authority of the United States over allotted lands. Such lands, however, in the opinion rendered in this case by the supreme court of the State of Oregon, are placed upon the same footing as vacant public lands or public lands upon which settlers have initiated bona fide claims; but such lands are not public lands subject to occupancy or settlement under the public land laws of the United States. They are on the contrary reservations set apart for special purposes ,for the benefit

of Indians residing thereon, and are controlled by the different department from the public lands of the United States, and no title to such lands is acquired through the general land department of the government, but through the special department of the office of the Secretary of the Interior with the commissioner of Indian affairs in charge thereof, and prior to the act of August 15, 1894, conferring jurisdiction to settle controversies over the rights to allotments upon the various United States circuit courts, all such controversies were determined through the Indian department of the government with the Secretary of Interior as head thereof, and there was no court provided with jurisdiction to settle such controversies. On August 15, 1894, however, Congress conferred jurisdiction upon the United States circuit courts to determine such matters. In passing upon the question of the jurisdiction thus conferred, the late United States District Judge Bellinger, in Parr v. U. S. 132 Fed. 1004, said: "There can be no proceeding of the character in question other than that provided for by the acts of Congress referred to. The jurisdiction conferred by these acts is exclusive in the circuit court of the United States." To the same effect is Patawa v. U. S. 132 Fed. 693-4; Smith v. Bouifer et al. 132 Fed 889, and Smith v. U. S. 142 Fed. 226, which latter case was decided by United States District Judge Wolverton, late chief justice of the supreme court of the State of Oregon. The statement of this court in Wisconsin Ry. Co. v. Price Co., *supra,* that "the constitution vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And this implies an exclusion of all other authority over the property which could interfere with the right or obstruct its exercise," would clearly indicate that where the United States has power to dispose of and make all needful rules and regulations, as it undoubtedly has over Indian lands whether allotted or unallotted, and has confered jurisdiction upon certain courts for settlement of all controversies regarding such lands, such jurisdiction must be exclusive. The title to the land is held in trust by the United States for the benefit of the allottee or his heirs in case of his death prior to the expiration of the trust period, to be conveyed free of all encumbrances, and the

government has the duty imposed of supervising the rental of such land and necessarily the occupancy thereof, and until the issuance of final patent has the exclusive control thereof. To suffer the various state courts to pass upon the right to occupancy of these lands would necessarily interfere seriously with the duties of the government and with its rights as trustee, and obstruct the exercise of such rights. If the state courts have jurisdiction over the right of occupancy of such lands they must necessarily have jurisdiction to enforce any judgments or decrees entered in regard thereto, and such decrees and enforcement thereof might seriously interfere with the rights and duties of the government as trustee in regard to such lands. Under the decisions heretofore cited, it is clear that one of the duties of the government as trustee is to protect the allottees of such lands in their possession and right of occupancy thereto, and the difficulty that might arise if jurisdiction over such lands should exist in the state courts, is well illustrated in the case of U. S. v. Rickert, *supra*. In that case if the state had jurisdiction to levy a tax upon the improvements upon allotted lands it would necessarily follow that the state courts would have jurisdiction to determine all rights to such improvements, and such a holding would interfere with the duties of the government as trustee. In the case of Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401 415, this court in an opinion rendered by Associate Justice Peckham, held in a suit brought in the United States circuit court for the district of Oregon under the act of August 15, 1894, prior to the amendment thereto of February 6, 1901, that the United States was not a necessary party to such suit, basing his decision, however, upon the terms of the statute itself, which provides that the judgment or decree of the court upon being properly certified to the Secretary of the Interior is to have the same effect as if the allotment had been allotted and proved by the secretary, and saying: "This provision assumes that an action may be maintained without the government being made a party, and provides for the filing of a certificate of the judgment and its effect and the government thereby in substance and effect consents to be bound by the judgment and to issue a patent in accordance therewith." But this construction so far as the necessity of the United States as a party

defendant, only applies to suits of this character begun in the United States circuit court under the provisions of the act, and could not and does not apply to a suit of this character begun in the state court. The decision in effect says that if the statute itself did not provide for the effect of such a decree and the action of the Secretary of the Interior therein, that it would have been necessary even prior to the amendment in a suit of this character in the United States court to have made the United States a party defendant. The United States, therefore, being a necessary party in all cases of this character, except where otherwise provided by statute, as held in the foregoing cases, it was a necessary party in this suit if the state court was to acquire jurisdiction of the subject matter of the suit.

As to the question of the citizenship of the allottees, we deem it unnecessary to do more than refer to the recent decision of this court in re Heff, 197 U. S. 488, and the other authorities heretofore cited on that point. Both of the parties herein, Joe Kalyton, deceased, and Louise, the mother of the plaintiff, being citizens of this state and subject to its laws at the time of their alleged marriage, must have been married according to the laws of this state, but the contention on the part of the plaintiff is not that they were married according to the laws of this state, but according to the Indain custom, and that custom having been abolished, there was no marriage between the parties.

Most respectfully submitted,

T. G. HAILEY and

R. J. SLATER,

Attorneys for Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1906.

WILLIAM MCKAY, (Substituted for Mary Kaylton) *et al.*,
Plaintiffs in Error,
vs.
AGNES KAYLTON, by Louise Kaylton, her Guardian *ad litem*,
Defendant in Error.
} No. 181.

In Error to the Supreme Court of the State of Oregon.

JOHN B. COTTON,
WM. FRYE WHITE,
For Defendant in Error.

Supreme Court of the United States

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AGNES KAYLTON, by Louise Kaylton, her Guardian *ad litem*,
Defendant in Error.

No. 181

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

STATEMENT OF CASE.

This is a suit in equity in the nature of ejectment by Agnes Kaylton, a minor, by her mother as guardian *ad litem*, to establish her right to the possession of a quarter section of land upon the Umatilla Indian Reservation allotted to Joe Kaylton, her father, under the Act of Congress of March 3, 1885, entitled: "An Act Providing for the Allotment of land in Severalty to the Indians Residing on the Umatilla Reservation in the State of Oregon, and Granting Patents therefor, and for other Purposes."

The plaintiff alleged that her father and mother were married according to the customs and habits of the Indians of the tribe to which her father belonged; that she was the

offspring of such marriage, and she contended that under the act of Congress of March 3, 1885, the Act of February 8, 1887, known as the General Allotment Act, and section five of the amendatory Act of February 28, 1891, as such offspring, she was entitled to the possession of the allotted lands of which her father died siezed.

The defendant was a sister of Joe Kaylton, the father of the plaintiff, and upon his death took possession of the allotted lands of which he died siezed, and claimed the right to hold them and enjoy their possession as the sole heir at law of Joe Kaylton, alleging that under the law of the state of Oregon, the father and mother of the plaintiff were not legally married; that the plaintiff was illegitimate, and therefore, under the laws of Oregon, not capable of inheriting land allotted under the act of March 3, 1885.

The Supreme Court of Oregon found that the father and mother of the plaintiff, both Indians, were married according to the custom of the tribe to which they belonged, and the court held that a marriage so consummated, was a lawful marriage according to the laws of Oregon, and that the plaintiff was entitled to the possession of the land in question and entered a decree giving her such possession.

Subsequently the defendant submitted a petition for a rehearing. This petition was not incorporated as a part of the record in this court, and hence, the points raised thereby can only be determined by reference to the opinion of the court refusing the rehearing. They were, as appears from examination of the opinion; first, the question of the jurisdiction of the state court over the subject matter; and, second, the necessity of the United States as a necessary party defendant. The court maintained its jurisdiction of the subject matter and held that the United States was not a necessary party.

Thereupon the defendant came to this court on writ of error assigning the following errors:

1. That the Supreme Court of the State of Oregon erred in holding and deciding that the marriage between Joe Kaylton and plaintiff's (defendant in error) mother, according to the customs of the Cayuse Indians which was consummated after the Act of Congress of February 8, 1887, commonly called the "Dawes Act" (24 St. U. S., 390, c. 119, section 6, 3d Fed. St. Ann., 496), was a legal union under the Act of Congress of February 28, 1891.

2. In holding and deciding that the courts of Oregon had jurisdiction of the subject matter of this suit, and in not holding that the United States Circuit Court for the District of Oregon, had exclusive jurisdiction thereof.

3. In holding and deciding that the United States government as trustee for said defendants, is not an indispensable party to this suit.

The Act of March 3, 1885, in so far as it is of importance in this case, is as follows (23 Stat., 340):

> "Chapt. 319.—An act providing for allotment of lands in severalty to the Indians residing upon the Umatilla Reservation, in the State of Oregon, and granting patents therefor, and for other purposes."
>
> "Whereas the confederated bands of Cayuse, Walla-Walla, and Umatilla Indians, residing upon the Umatilla Reservation, in the State of Oregon, have expressed a willingness to settle upon lands in severalty on their said reservation, and to have the residue of their lands not needed for such allotment sold for their benefit: Therefore,
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States cause lands to be allotted to the confederated bands of Cayuse, Walla-Walla, and Umatilla Indians, residing upon the Umatilla Reservation, in the State of Oregon, as follows, of agricultural lands:
>
> "To each head of a family, one hundred and sixty acres; to each single person over the age of eighteen

years, eighty acres; and to each child under eighteen years of age not otherwise provided for, forty acres." * * * * * * * * * *

"The president shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States shall convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have executed, except as hereinotherwise provided:" * * *

We have not quoted such parts of the act as deal solely with procedure, etc.

The Act of February 8, 1887, so far as it is of importance in this case, is as follows (24 Stat., 390):

"Chapt. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause such

reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

"To each head of a family, one-quarter of a section;

"To each single person over eighteen years of age, one-eighth of a section;

"To each orphan child under eighteen years of age, one-eighth of a section; and

"To each single person under eighteen years of age now living or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section; *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual."

* * * * * * * * * *

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue the reform in the name of the allottees, which patents shall be of legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, to his heirs according to the laws of the State or Territory where such land is

located, and that at the expiration of said period the United States will convey the same by patent for said Indian; or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all the lands in the Indian Territory which may have been allotted in severalty under the provisions of this act:"

* * * * * * * * * *

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a mem-

ber of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any Indian to tribal or other property."

* * * * * * * * * * *

"Sec. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order."

* * * * * * * * * * *

We have not quoted such parts of the Act as deal solely with procedure, etc.

The Act of February 28, 1891, so far as it is of importance in this case, is as follows (26 Stat., 794):

"Chapt. 383.—An act to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled, 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes.'"

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the act entitled, 'An act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, be, and the same is hereby, amended so as to read as follows:

"'Sec. 1. That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty

stipulation or by virtue of an Act of Congess or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause such reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land; *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual in quantity as above provided the land in such reservation or reservations shall be allotted to each individual pro rata, as near as may be, according to legal subdivisions: *Provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty to certain classes in quantity in excess of that herein provided, the President, in making allotments upon such reservation, shall allot the land to each individual Indian of said classes belonging thereon in quantity as herein provided: *Provided further*, That where existing agreements or laws provide for allotments in accordance with the provisions of said act of February eighth, eighteen hundred and eighty-seven, or in quantity substantially as therein provided, allotments may be made in quantity as specified in this act, with consent of the Indians, expressed in such manner as the President, in his discretion, may require: *And provided further*, That when the lands allotted, or any legal subdivision thereof, are only valuable for grazing purposes, such lands shall be allotted in double quantities."

"'Sec. 2. That where allotments have been made in whole or in part upon any reservation under the provisions of said act of February eighth, eighteen hundred and eighty-seven, and the quantity of land in such reservation is sufficient to give each member of the tribe eighty acres, such allotments shall be revised and equalized under the provisions of this act: *Provided*, That no allotment heretofore approved by the Secretary of the Interior shall be reduced in quantity.'"

* * * * * * * * * *

"Sec. 5. That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken, and deemed to be the legitimate issue of the father of such child."

* * * * * * * * * * *

We have not quoted such parts of the act as deal with procedure, etc.

Points of Argument.

1. This court has no jurisdiction to review this cause on writ of error because no title, right or immunity specially set up or claimed under any Federal Statute, has been denied.

2. That if the court below erred as specified in assignment of error number one, in holding that the marriage of Joe Kaylton and Louise was a legal marriage under the Act of Congress of February 28, 1891, it was an immaterial error and one which can not in the nature of things be prejudicial to the party against whom the decision was rendered, and that, therefore, if the relief granted is correct according to law, this court will not reverse the decision below.

3. That the provisions of the Act of Congress of February 8, 1887, and section five of the amendatory act of February 28, 1891, apply to lands allotted under the Act of Congress of March 3, 1885, and that, therefore, the court below having found that Joe Kaylton and Louise, Indians residing upon the Umatilla Reservation, were married according to the customs and habits of such Indians, and

having found that the plaintiff was the offspring of such marriage, it committed no error in holding and decreeing that the plaintiff should have the possession of the land of which her father as an allottee, died seized.

4. The Supreme Court of Oregon had jurisdiction of the subject matter and the Act of Congress of August 15, 1894, did not oust the jurisdiction of the State court and place it exclusively in the Circuit Court of the United States for the District of Oregon, but the jurisdiction as between these courts is concurrent.

5. The Supreme Court of the State of Oregon having jurisdiction of the subject matter, the United States is not a necessary party defendant.

Argument.

WE SUBMIT THAT THIS WRIT OF ERROR SHOULD BE DISMISSED BECAUSE THE COURT BELOW WAS NOT CALLED UPON TO AND DID NOT, IN FACT, PASS UPON OR DECIDE ANY QUESTION WHICH BY THE TERMS OF SECTION 709, R. S. U. S., IS MADE THE BASIS UPON WHICH THE JURISDICTION OF THIS COURT MUST DEPEND.

Examination of the record here discloses that there was no question involved as to the validity of any treaty or statute or authority exercised under the United States. Nor was there any question involved as to the validity of any state statute upon the ground of repugnancy to the Federal Constitution. Nor, as we view the record, was there any title, right, privilege, or immunity under any law of the United States specially set up or claimed by the party against whom the decision below was rendered. The record in the answer (Transcript, p. 16), the decree (p. 35), and the opinion (p. 29) of the court below discloses that the defendant based her claim to the right of possession

of the land in controversy, solely on the ground that she and not the plaintiff, was the sole and only heir at law, *under the laws of the State of Oregon,* of Joe Kaylton, deceased (her brother), and that as such heir at law, she was entitled to the possession of the allotted land of which her brother died seized. She contended that the father (her brother) and mother of the plaintiff, *were not married according to the law of Oregon,* and that the offspring, the plaintiff, was *illegitimate under the laws of Oregon,* and, therefore, not entitled to the possession of her deceased father's allotted lands.

The marriage in question between Joe Kaylton and Louise having been found by the court, as a matter of fact, to be in conformity with the Indian custom, it was held as a matter of law *to be a legal marriage according to the state law;* and the conclusion then reached was that the plaintiff, the offspring of such marriage, was the sole heir at law of her father under the law of Oregon, and as such was entitled to inherit the allotted lands of which her father died seized.

Reference to the Act of March 3, 1885, quoted in part, *supra,* discloses the following provision: "The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, *of his heirs according to the laws of the State of Oregon,* and that at the expiration of said period the United States will convey by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided, That the law of alienation and descent in force in the State of Oregon shall apply thereto* after pat-

ents have been executed, except as herein otherwise provided." (Italics ours.)

The Act of February 8, 1887, contains similar language.

It is plain from the reading of these acts that any question arising as to inheritance, was to be decided according to the law of the state. That was made by the act the only law which would measure the rights of parties claiming the lands of a deceased allottee. This suit, so far as the defense is concerned, was contested solely upon the ground of the application of the state law of Oregon to the situation of the parties, and we contend that in no sense was any title specially set up by the losing party depending upon any Federal law.

The case of Corkran Oil and Development Company vs. Arnaudet, 199 U. S., 182, is similar in principle to this cause. There the act of Congress under which both parties claimed title to the land in dispute, provided in section two:

> "That nothing contained in this act shall in any manner abridge, divest, impair, injure, or prejudice any valid right, title, or interest of any person or persons in or to any portion or part of the lands mentioned in said first section, the true intent of this act being to relinquish and abandon, grant, give, and concede any and all right, interest, and estate, in law or equity, which the United States is or is supposed to be entitled to in said lands, in favor of all persons, estates, firms, or corporations who would be the true and lawful owners of the same under the laws of Louisiana, including the laws of prescription, in the absence of the said interest and estate of the United States."

And the Supreme Court of Louisiana decided the rights between the parties by the application of a state statute of limitation. This court dismissed the writ of error on the ground that no Federal question was involved, and Chief Justice Fuller in delivering the opinion of the court, said:

> "If it be conceded that the plaintiff specially set up and claimed title to the land in controversy under the Act of Congress of February 10, 1897, that would not be sufficient to give jurisdiction unless the state court had decided against such title. What was decided was that the prescribed period having elapsed, article 233 of the Louisiana constitution operated as the equivalent of legal title through the tax deed. The correctness of this conclusion depended on the proper construction and application of the provisions of the state constitution on the facts found, and not on the Constitution or laws of the United States."

And so in this case if it be conceded that the defendant specially set up and claimed title to the land in controversy under the Act of March 3, 1885, yet that act having made the state law the criterion of decision as to matters of inheritance, and the state court actually deciding against defendant's claimed title, by the application of state law to the facts, in no sense was a Federal law involved in the decision.

Nor was any right, title or immunity specially set up or claimed under a Federal statute, involved in the determination by the court in refusing a rehearing upon the petition for a rehearing; as has been stated, the defendant has not made his petition for a rehearing a part of this record, and the points raised by him in that petition can only be judged from the opinion of the court in refusing the petition. The sole questions disclosed in the opinion of the court were (1) whether the Supreme Court of Oregon had jurisdiction of the subject matter, and (2) whether the United States was a necessary party. There is nothing in the opinion which discloses that the court was asked to pass upon any immunity from suit in the state court because of the existence of a Federal statute which gave to any other court jurisdiction of such subject matter as was involved in this cause. This question as appears from the opinion, was decided by the application of general principles of law.

Nor does it appear that the contention that the United States was a necessary party defendant, depended upon any claim that the United States was such necessary party on account of any provision of a Federal statute. This again appears by the opinion of the state court to have been decided solely upon general principles.

This court has many times held that it is too late to raise by a petition for rehearing a Federal question in order to give this court jurisdiction on writ of error, although it has been held that if the record disclosed that a hearing was had upon the petition for a rehearing, and in denying the petition, the state court has actually or necessarily passed upon Federal questions raised by the petition, this court will consider such questions seasonably raised.

Mallet vs. North Carolina, 181 U. S., 592;
Loeber vs. Schroeder, 149 U. S., 580;
McMillian vs. Ferrum Mining Co., 197 U. S., 347.

We contend that in this case that not only does the record not disclose that any Federal queston was raised by the petition for a rehearing for the very good reason that the petition for rehearing is not incorporated in this record, but that the court upon the hearing upon the petition for a rehearing, did not base its decision upon the consideration of a Federal question. We, therefore, ask that the writ of error may be dismissed as not involving any Federal question of which this court has jurisdiction.

2. *But if the court finds that it has jurisdiction of this cause upon the writ of error, we contend that the errors assigned are not well taken.*

Assignment number one is that "the Supreme Court of the State of Oregon erred in holding and deciding that the marriage between Joe Kaylton, the plaintiff's (defendant in error) mother, according to the customs of the Cayuse Indians, which was consummated after the Act of Congress

of February 8, 1887, commonly called the "Dawes Act" (24 St. U. S., 390, c. 119, section 6, 3d Fed. St. Ann, 496), was a lawful union under the Act of Congress of February 28, 1891."

We are constrained to admit that the construction given by the state court to the acts of Congress referred to in this assignment of error, is not a proper construction thereof, but we contend that the error committed is an immaterial error, and one which could not, upon the merits of the case, prejudice the defendant. *The state court construed the acts of Congress solely for the purpose of determining the personal and political status of the Indians affected, because in its view of the case, the status of the Indian fixed the question as to whether a marriage to be valid according to the law of the state must be a marriage consummated according to the strict formalities provided by its statutes, or whether the Indians could be considered a political entity and the comity in relation to marriage extended to them the same as to parties married in other political communities according to the law thereof. That is to say, the state court of Oregon construed these acts of Congress not to have disrupted the tribal relation of the Indians affected by their terms, and held that marriages consummated according to the customs of the tribe were legal marriages according to the laws of Oregon.*

The logical and only result of such construction was to hold that the plaintiff, the offspring of such marriage, was entitled to inherit from her father under the laws of Oregon. A *proper construction* of these acts of Congress *would result in the same conclusion, but for different reasons,* hence we say, that although the court may have committed error in holding that the marriage of the father and mother of the plaintiff was a legal marriage under the acts of Congress, it is immaterial error and one which would not justify this court in reversing the decision of the court be-

low. In fact it was not necessary for the court below to have looked to the acts of Congress to determine the question of the legality of Indian marriages, for the Act of Congress of February 8, 1887, having made Indians affected thereby, citizens of the United States, it was no longer within the power of Congress to determine what should be or what should not be, the criterion of legal marriage among the Indians; that was a matter which then became one wholly of state authority.

This is a case in which the court below has reached a proper decree, but its reasons and arguments are faulty. This court will not reverse a state court upon such conditions, for upon reversal the state court could only correct its opinion. Its decree would remain unaltered. As this court said in Erwin vs. Lowry, 7 How., 172:

> "The whole proceeding commencing with the petition of Andrew Erwin demanding a seizure and sale, to James Erwin's deed from the marshal, was the exercise of one authority; and the question submitted for our consideration is, whether the marshal's sale was void on any legal ground; that is to say, whether the deed by the marshal to James Erwin was void for the reason that it was not supported by a lawful judgment, or that, for want of a compliance with any legal requirements in conducting the seizure and sale, the deed was void. *If void on any one ground, it would be altogether useless to reverse the judgment because an error had been committed on some other ground; as, on the cause being remanded, the state court would pronounce the deed void a second time on the true ground.* This court was compelled to so hold in Collier vs. Stanbrough, 6 How., 14." (Italics ours.)

This court does not sit for the purpose of correcting errors in opinions and reasoning of state courts, but to decide if the judgment rendered is sustainable in law. The de-

cree entered by the Supreme Court of Oregon is correct and ought to be affirmed.

WE SUBMIT THAT THE ACT OF CONGRESS OF FEBRUARY 8, 1887, WAS A GENERAL ALLOTMENT ACT APPLICABLE TO THE UMATILLA RESERVATION AND TO ALLOTTEES UNDER THE ACT OF MARCH 3, 1885; THAT THE FIFTH SECTION OF THE ACT OF CONGRESS OF FEBRUARY 28, 1891, IS ALSO APPLICABLE TO THE UMATILLA ALLOTTEES, AND THAT UNDER SECTION FIVE JUST MENTIONED, THE STATE COURT HAVING DETERMINED AS A MATTER OF FACT THAT THE FATHER AND MOTHER OF PLAINTIFF WERE MARRIED ACCORDING TO THE CUSTOM OF THE TRIBE, ITS CONCLUSION THAT SHE WAS ENTITLED TO THE POSSESSION OF HER DECEASED FATHER'S LAND, WAS CORRECT.

In determining whether Congress intended the Act of February 8, 1887, to ge a *general* act of universal application in *all* its provisions to *all Indians* upon the reservations, it is helpful to investigate briefly the legislative history of the treatment of the Indians by Congress in the matter of allotment of lands in severalty.

It is a well known fact that the United States in its capacity as "guardian of the Indians," has steadily been endeavoring to induce the Indians to surrender the customs and habits of Indian life, and hasten the time when the Indians would become fit to be citizens of the United States and entitled to all rights and privileges as such.

In carrying out this object one of the methods adopted by the Government has been to allot and patent lands to Indians in severalty, the belief being that this would instill in the Indian allottee a spirit of independence and thrift and a realization of the rights and duties dependent upon the

control and ownership of lands in his own right, a result not fostered by the irresponsibility of ownership in common to which the Indians had long been accustomed.

This purpose has been evidenced both in treaties and in special acts conferring upon various tribes the right to have lands within the reservations allotted in severalty, the Indians being subject after allotment to the general control and direction of the United States in the use of their lands. The policy of the Government has been to retain in trust the fee title to the allotted lands for various periods of time. This has been done in all the acts of Congress applicable to allotments in severalty, and is but an indication of the belief of Congress that the Indians had not reached that point where an absolute fee simple title could be safely given.

The Act of Congress of March 3, 1885, provided for allotments and patents to Indians residing upon the Umatilla Reservation in the State of Oregon. This act provided that the Indians should be allotted lands in certain quantities and patents should be issued therefor which in terms should state that the United States would hold the land thus allotted, for a period of twenty-five years in trust for the sole use and benefit of the allottee and *his heirs according to the law of the State of Oregon. The act further pro*vided that "the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed except as herein otherwise provided."

An examination of the preamble and enacting clause of the Act of February 8, 1887, discloses that it was in terms a general act; the language of the preamble is:

> "An act to provide for the allotment of lands in severalty to Indians on the *various reservations* and to extend the protection of the laws of the United States and the Territories over *the* Indians, and for other purposes."

The language of the enacting clause is:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That *in all cases* where *any tribe* or band of Indians *has been* or shall hereafter be *located* upon *any* reservation created for their use either by treaty stipulation or *by virtue of an act of Congress* or executive order, setting apart the same for their use," etc.

The language of this preamble and enacting clause certainly indicate that this act was a general act applicable to *all Indians* living upon reservations whether created by treaty, by previous act of Congress or by executive order. We believe that if nothing else in this statute of February 8, 1887, assisted in the determination of the question as to whether this was a general act and intended as a substitute for all previous acts relating to the same subject matter, that this preamble and enacting clause would be sufficient. But we think there is in the act other language which bears out this contention. Congress was, of course, cognizant of its previous legislation, and must have known that some of these previous acts may have provided for allotments in amount larger or smaller than those provided for in the act under consideration. Consequently in carrying out the intention to treat all Indians alike, and possible in a spirit of fairness to those Indians who had already under previous acts, been allotted lands in excess of the provisions of the act of February 8, 1887, and had for varying lengths of time enjoyed them, Congress in section one under a proviso, enacted: *"Provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities *in excess* of those herein provided, the President in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act." It will be noted, however, *that Con-*

gress does not in this act either by proviso or otherwise, provide that these acts or treaties shall be recognized wherein provision is made for allotments in less amount than that provided for in the Act of 1887. With the broad general language of the preamble and the enacting clause and the proviso just referred to, before us, are we not driven to the conclusion that these previous acts in so far as they provide for allotments *in less quantity* than that provided for in the Act of 1887, are to that extent, at least, repealed and modified?

This act also contains in *section six* another provision of the utmost importance to the Indians, and one which must be held to apply to all Indians.

This section presents a further argument and we believe a conclusive one, that the Act of 1887 was intended to apply, as its preamble and enacting clause say, *to all Indians on the various reservations.* No reason can be assigned why Indians who had received allotments years before, and had had the benefits to be derived from the possession of such lands in severalty, should be treated differently in that most important feature covered by section six referred to. That section provides "that upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made, shall have the benefit of and be subject to the laws both civil and criminal of the state or territory in which they may reside," and again in a subsequent clause "and every Indian born within the territorial limits of the United States *to whom allotments shall have been made under the provisions of this act or any law or treaty*, and every Indian born within the territorial limits of the United States, who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States,

and is entitled to all the rights, privileges and immunities of such citizens. * * *"

By the terms of this section any Indian who had under any previous special law or treaty, received an allotment of land in severalty, is declared a citizen of the United States.

Again, it would have been a simple thing and under the circumstances a most logical thing, if Congress had intended that the provisions of the special Act should remain in full force and effect, to have excepted the Indians provided for in such previous special acts, from the provisions of the Act of 1887.

It is significant that in section eight of this statute, Congress did except certain Indians from the provisions of this act; and it is also significant that none of them included Indians who had been provided for in previous special acts. Congress for some reason which we can not attempt to propose, saw fit at this time, to treat the Indians excepted in this act, in a different manner.

Construing this statute as we have, we believe that we are compelled to the conclusion that it was the intention of Congress that this Act should be of general application and a substitute for all previous special acts relating to the same subject matter.

It is not necessary that Congress should specifically repeal previous acts, or extend the provisions of the subsequent act in terms to the beneficiaries of the prior act; it is true that the courts do not favor repeal by implication, but the rule of law in respect to such repeals has been very plainly laid down by this court in numerous cases. Take for instance, the case of the United States vs. Tynen, 11 Wallace, 88, page 92, the court said:

> "When there are two acts on the *same subject*, the rule is to give effect to both if possible, but if the acts are repugnant in *any* of their provisions, the latter act

> *without any repealing clause operates* to the extent of the repugnancy as a repeal to the first, and even where the two acts are not in express terms repugnant, *yet if the latter covers the whole subject of the first and embraces new provisions plainly showing that it was intended as a substitute for the first* act, it will operate as a repeal of that act."

We have pointed out that in the proviso in section one of the Act of 1887, Congress recognized that this act was repugnant to some of the provisions of the previous special acts, for otherwise there would have been no excuse for the proviso. And even if the Acts of 1887 and 1885 were not repugnant, yet it is perfectly clear that the former covers the whole subject matter of the latter, and does embrace new provisions, such as the amounts of allotments, and section six which show an intent to substitute the former for the latter within the meaning of the language in the Tynen case, *supra.*

In *ex parte* Crow Dog, 109 U. S., 556, this court cited and quotes from the English case of Thorp vs. Adams, L. R. 6 C. P., 135:

> "The general principle to be applied to the construction of acts of parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together."

It is apparent that the Act of 1885 as well as other special acts, are *expressly referred* to in the Act of 1887, wherein the language occurs in the proviso above referred to: "That where the treaty or Act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantity in excess of those provided for herein," and again in section six where the statute provides "that upon the com-

pletion of *said allotments* and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made, shall have the benefit of and be subject to the laws both civil and criminal, of the state or territory in which they reside;" and again in the same section where it is provided *"and every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or under any law or treaty."*

Again in Parquete Habana, 175 U. S., 677, on page 685, the court said:

> "As was long ago settled by Chief Justice Marshall, 'the spirit as well as the letter of the statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.' "
>
> Deurosseau vs. United States, 6 Cranch, 344.

And the court reiterates what was expressed in the quotation already made from the Tynen case, *supra.*

We believe and we submit, that the whole context of the law of 1887, demonstrates a *particular intent* on the part of Congress to provide for and define a uniform treatment of *all* the Indians on *all* the reservations within the United States with the exception of those particularly excepted from the provisions of the act in section eight.

Reference to the Congressional Record bears evidence of the intent or purpose which Congress had in mind in the passage of the statute of 1887, and this evidence bears out the contention which we have been making that the Act of 1887, was a general act intended to apply to all Indians irrespective of whether previous special allotment statutes had been passed respecting them, or not.

Mr. Teller, in the Senate, page 1763, 49th Congress, 1st Session, in discussing the bill, said:

> "I want to see this principle applied to all reservations because the great mass of Indians are not on executive order reservations; the great mass of Indians are on reservations established either by treaty or by act of Congress, and we are not now treating as we were the other day, with the Sioux tribe. *We are making general law for governing the Indians of the United States.*"

And Mr. Skinner, in the House of Representatives, page 190, 49th Congress, Second Session, in presenting the bill for consideration to the House said: "Mr. Chairman, from the beginning of our existence as a nation, the Indian has been subject to national legislation, *but at no time so much as now, has there been such pressing necessity for the adoption of a general Indian policy;* the enactment of some measure that will lead to a correct solution of the Indian problem." He then proceeded to take up this bill.

Mr. Justice Harlan in the opinion delivered by him in United States vs. Rickert, 188 U. S., 432, speaks of the Act of February 8, 1887, as "The General Allotment Act," p. 435, and this court has several times construed the act, and it has never been contended or suggested that this act was not general and furnished the rule for allotment both as to quantity and quality and the political status of *all* the Indians on *all* the reservations.

If, as we insist, the Act of February 8, 1887, is a general law applicable in all its particulars, to all Indian allottees, whether allotments have in fact been made under the Act of February 8, 1887, or under previous special acts, then the Act of February 28, 1891, which in its terms is amendatory of the Act of February 8, 1887, also applies in all particulars to Indians affected by any previous acts, and in particular to the Act of March 3, 1885, involved in this case.

The Act of February 28, 1891, as stated in the preamble is "An act to amend and further *extend the benefits* of the Act approved February 8, 1887, entitled:

> "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the application of the laws of the United States over the Indians, and for other purposes."

The act then proceeds to amend section one of the Act of 1887, by providing for the equalization of allotments to Indians "located upon *any* reservation created for their use either by treaty stipulation or by virtue *of an act of Congress.* * * *"

The proviso of the Act of 1887 in reference to the allotments in excess of those provided by the Act of 1887, is again incorporated. Section two of the Act of 1891 provides for the revision and equalization of allotments under provisions of this act providing, however, "that no allotment heretofore approved by the Secretary of the Interior shall be reduced in quantity."

Section five of the Act of 1891 is the section to which we call particular attention, and which furnishes the criterion for the proper decision of this case. It is in these words:

> "That for the purpose of determining descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purposes aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child otherwise illegitimate shall for such purpose, be taken and deemed to be the legitimate issue of the father of such child."

It will be remembered that section five of the Act of 1887, which is referred to in section five of the Act of 1891, just quoted, is the section which provides the manner in which the patents shall be issued to the Indians, the

quality of the title given to the Indians, and under a proviso, enacts "that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered except as herein otherwise provided."

Now, if section five of the Act of 1887 does apply, as we contend, to allotments made under the Act of 1885, then section five of the Act of 1891, also applies.

The next point for determination is the meaning and purpose of Congress in the enactment of section five of the Act of 1891. It will be noted that the broad language of section five of the Act of 1887 in reference to the application of state laws, and of section six, which subjects Indian allottees to the laws both civil and criminal of the state and territory within which the reservation is located, would give to the courts as a measure or standard of legal marriage and of legitimacy, the measure or standard provided by the laws of the respective states. Questions of descent often involve the determination of legal marriage and legitimacy.

We must remember that Congress in these acts is dealing with a peculiar race. A race which has withstood the forces of civilization in a remarkable degree, and probably in no particular have they progressed so little as in their marital relations. It was, therefore, a far reaching advance when Congress in the Act of 1887 provided that the laws of the state should determine questions of descent, which, as we have stated, necessarily involve oftentimes, questions of legal marriage and the legitimacy of offspring. It is not strange under the circumstances, that difficulties should arise in the application of state laws, due to the fact that the Indians insisted upon retaining their own customs and habits of marriage and refused to recognize the benefits to be derived by following the laws of the respective states in such matters.

We believe that the existence of the fifth section of the Act of 1891, is but the expression of the congressional will that in so far as the inheritance of these particular Indian lands was concerned, the strict rule of marriage and legitimacy of the states should be suspended, and the inheritance allowed to offspring of parents married according to the Indian custom, or to offspring as the section says "otherwise illegitimate." *The section does not pretend and can not be construed to be an attempt to withdraw the Indian from the obligation to marry according to the law of the state which obligation was a necessary resultant of the extension of citizenship both of the United States and the state; Congress could not constitutionally legislate for the states.*

It should be remembered that Congress was dealing with the inheritance of its own lands. That is to say, that while the Indians had received patents, which as Mr. Justice Harlan said in the Rickert case, *supra,* were mere "memoranda" of allotments, which stated the condition of allotment and a promise of future title, the United States still retained the legal title, and with that title could deal as it saw fit.

Many cases in this court have stated that the title to these lands remained in the United States and that Congress could legislate in regard to them. The state can not tax them during the trust period. Rickert case, *supra.* Retaining the legal title it is within the power of the United States to deal with them as it wills. The declaration of trust made as to those lands is a mere gratuity, without consideration; Congress attached certain conditions to the trusts. It could attach others at any time which to it might seem to be to the advantage of the Indians. The condition that the right to the benefit of the trust should descend according to state law, *was one of these conditions;* that the Indians should not alien or lease except upon certain conditions, was another. If Congress found (as it undoubtedly did) that the appli-

cation of the strict and highly moral law of a state as to marriage and legitimacy in so far as these matters affected inheritance was in fact working or likely to work hardship upon the Indians, it was surely within the power of Congress to modify the condition. Congress intended the allotments solely for the benefit of the Indians. It was thought better to overlook the infractions of the state law and temporize with the Indians, giving the *benefit of the allotments to issue legitimate or illegitimate.*

The section in question did not encourage laxness in the marriage formality, but extended charity to the poor Indian who did not rise to the dignity of the state formality.

The Supreme Court of Oregon in holding that the father and mother of the plaintiff were married according to the customs of the tribe, and that the plaintiff was the offspring of such marriage, was simply finding the presence of the conditions furnished by section five, and it decided correctly that the plaintiff was entitled to the possession of the land in suit.

THE SUPREME COURT OF OREGON HAD JURISDICTION OF THE SUBJECT MATTER, AND THE ACT OF CONGRESS OF AUGUST 15, 1894, DID NOT OUST THE JURISDICTION OF THE STATE COURTS.

The second assignment of error is as follows:

2. In holding and deciding that the courts of the state of Oregon had jurisdiction of the subject matter of this suit, and in not holding that the United States Circuit Court for the District of Oregon had exclusive jurisdiction thereof.

The following extract from the opinion of the court below, page 38 of the transcript, epitomizes its reasons for maintaining its jurisdiction:

> "In the case at bar Joe Kaylton was entitled, during his life time, to the possession of the land allotted to him and upon his death, his heirs, under the law of

descent in this state, succeeded to his right in the premises. This possession having been disturbed by one who is not his successor in interest or estate, according to such law, the rule established in this state makes it incumbent upon our courts, in aid of the beneficient policy adopted and pursued by the general government in caring for the Indians and in trying to promote their civilization, to declare by solemn decree who is his legal heir."

The jurisdiction exercised by state courts over citizens of the state in matters involving the right to possession of lands entered under the homestead laws is precisely the same as that exercised over Indians claiming the right to possession of allotments held in trust by the United States. In both cases before final patent is issued the title to the property is in the United States, and there is only a right of entry to the possession in one or the other of the claiming parties. That the state courts have exercised jurisdiction over these matters, is well known. In Kitcherside vs. Myers, 10 Oregon, 21, it was held that where a person who had taken the initiatory steps to secure title to public land, received from the proper officer the necessary evidence thereof, he was entitled to the possession of the premises selected and for any interference therewith by another without legal title or equitable claim, a state court, upon application of the entryman, would put him in possession of his rights. Any unlawful interference with the possession of a person entitled to possession of land to which the United States hold title will be prevented by the state courts.

Jackson vs. Jackson, 17 Oregon, 110.
Hindman vs. Rizor, 21 Oregon, 112.
Allen vs. Dunlap, 24 Oregon, 229.
Bishop vs. Baisley, 28 Oregon, 119.
Pacific Live Stock Co. vs. Gentry, 38 Oregon, 275.
Browning vs. Lewis, 39 Oregon, 11.
Moore vs. Halliday, 43 Oregon, 243.

The same thing was held in the case of Bird vs. Winver, 64 Pac., 178; Swartzell vs. Rogers, 3 Kans., 374.

The Supreme Court of the United States in the case of Felix vs. Patrick, 145 U. S., 317, 332, said:

> "Nor did their heirs apparently make any effort to discover it until 1887, when their intelligence seems to have suddenly sprung into activity upon their becoming citizens of the United States. It is scarcely necessary to say in this connection that while until this time they were not citizens of the United States, capable of suing as such in the federal courts, the courts of Nebraska were open to them as they are to all persons irrespective of race or color."

The Supreme Court of the State of Washington in the case of Bird vs. Winyer, 64 Pac., 178, announces the same doctrine, also, the State of Idaho in the case of Wa-la-note-tke-tynin *et ux.* vs. Carter *et al.* found in the 53 Pac., 106.

Swartzell vs. Rogers, 3 Kan., 374.
Felix vs. Patrick, 145 U. S., 332.

The state courts also have jurisdiction to determine who are the heirs of deceased persons; this jurisdiction can not be questioned. In Klayton vs. Klayton, 78 Pac., 332, that authority is affirmatively asserted.

The state courts have repeatedly exercised jurisdiction in cases involving rights to allotted lands.

Mosgrove vs. Harper, 33 Ore., 252.
Carter vs. Wann, 57 Pac., 314 (Idaho).
McBean vs. McBean, 61 Pac., 418.
Wa-la-note-tke-tynin *et ux.* vs. Carter *et al.* (Idaho).

A tribal Indian whether he be a citizen or not may maintain actions in the state courts to redress any wrong committed against either himself or his property.

Selkirk vs. Stephens, 72 Minn., 335.
Swartzel vs. Rogers, 3 Kan., 374.
Wiley vs. Keokeuk, 6 Kan., 94.
Ingrahm vs. Ward, 56 Kan., 550.
Whirlwind vs. Von der Ahe, 67 Mo. App., 628.
Felix vs. Patrick (C. C.), 36 Fed., 457.
Y-ta-tah-wah vs. Rebock (C. C.), 105 Fed., 257.
Felix vs. Patrick, 145 U. S., 317.
Bem-way-bin-ness *et al.* vs. Eshelby *et al.*, 91 N. W., 291.
16 Am. & Eng. Ency. Law., p. 216.
Stacey vs. LaBelle, 99 Wis., 520.
Mo. Pac. Fy. Co. vs. Cullers, 31 Tex., 382.

State courts have jurisdiction over controversies respecting land lying within the state and belonging to, or claimed by, Indians.

22 Cyc. Law & Procedure, p. 149.
Wright vs. Marsh, 2 Greene (Iowa), 94.
Telford vs. Barney, 1 Greene (Iowa), 575.
Bem-way-bin-ness vs. Eshelby, 87 Minn., 108.
Bird vs. Winyer, 24 Wash., 269.

In cases where jurisdiction depends upon the subject matter of the controversy, the weight of authority seems to favor the right of an Indian to a standing in both the United States court and those of the state.

10 Am. and Eng. Ency. of Law., p. 441.

The constitution of Oregon, section 10, article 1, provides: "That every man shall have remedy by due course of law, for injury done him in person, property or reputation." "Every man" includes Indians who have been made by law citizens of the United States and of the state, as well as any other class of citizens.

If the state court was wrong in maintaining its jurisdic-

tion of this cause it was because the Act of Congress of August 15, 1894, 28 Stat., 305, had the effect of ousting the jurisdiction up to that time residing in the state tribunals over such subject matter and giving it *exclusively* to the circuit courts of the United States. This act, so far as the same is germane to this decision, reads as follows:

> "All persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they may claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto, in the proper circuit court of the United States."

It will be noted that this act confers jurisdiction upon the circuit courts of the United States *affirmatively* for the purposes therein enumerated, but there is no suggestion that that jurisdiction shall be *exclusive*. Whether the federal courts possess concurrent or exclusive jurisdiction under the particular act of Congress depends upon the provisions of the act. In writing upon this subject of jurisdiction and the right of federal courts to hear and determine exclusively, controversies arising under the acts of Congress, Justice Story says:

> "That there are some cases in which that power is *exclusive* can not be well doubted; that there are others, *in which it may be made so by Congress,* admits of as little doubt; *and that in other cases it is concurrent in state courts,* at least *until Congress shall have passed some act excluding the concurrent jurisdiction, will scarcely be denied.*"

Chancellor Kent says:

> "In judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress."
>
> Kent's Com. Lec., 18.

Mr. Abbott says:

> "Whether in a given case Congress had conferred exclusive jurisdiction depends upon the statute conferring it, in the interpretation of which some weight is due to the consideration that in respect to many classes of cases the state courts had jurisdiction prior to the adoption of the Constitution, and that the presumption in such cases is against the alienation or surrender of state power by implication."
>
> Abb. U. S. S. Prac., Vol 1, P. 63.

As was said in Martin vs. Hunter, 1 Wheaton, 304, 337:

> "It is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others may be made so at the election of Congress."

Teal vs. Fulton, 12 Howard, 284, was a case of trover in a justice's court to recover the value of a newspaper received by the defendant, the postmaster, at Syracuse, which he refused to deliver to the plaintiff to whom it was addressed. It was insisted that the courts of New York had no jurisdiction to try the case. This court held that the act of the postmaster was a conversion, and then proceeded to say:

> "His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for

some cause the suit brought is an exception to the general jurisdiction of the court. Now the courts in New York, having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the constitution of the United States. We find in the 25th section of the judiciary act of 1789, under which this act is before us, that such a concurrent jurisdiction in the courts of the states and of the United States was contemplated, for its provision is for a review of cases adjudicated in the former, 'where is drawn in question, the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.' "

The statutes of the United States are as much the law of the land in any state as are those of the state; and although exclusive jurisdiction for their enforcement may be given to the federal courts, yet were it not given, either expressly or by necessary implication, the state courts having competent jurisdiction in other respects, may be resorted to. In such cases the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law. A state court, therefore, can exercise concurrent jurisdiction with the federal courts in cases arising under the constitution, laws and treaties of the United States, where it is not excluded by express provisions, or by incompatibility in its exercise arising from the nature of the particular case.

Bailey on Jurisdiction, sec. 93.
Cliflin vs. Houseman, 93 U. S., 130.

Statutes which merely give jurisdiction affirmatively to one court do not oust that already existing in another.

Black on Interpretation of Law, p. 123.

It can not be contended that the Act of August 15, 1894, expressly confers exclusive jurisdiction on the circuit courts of the United States. *It is affirmative jurisdiction only which is extended.*

Hence, we conclude that before the passage of the Act of August 15, 1894, the state court undoubtedly had jurisdiction to determine who was the heir at law of an Indian allottee, and to protect the person thus found to be an heir, in the possession of that property which was granted him by the terms of an act of Congress.

We conclude further that the Act of August 15, 1894, does not in terms or by necessary implication, oust the fundamental jurisdiction of the state courts, and place it in the circuit courts of the United States, but the grant of jurisdiction in the Act of August 15, 1894, is affirmative only, and leaves such a subject matter as is involved in this cause, subject to the concurrent jurisdiction of the state court and the circuit courts of the United States, at the option of the moving party.

THE UNITED STATES WAS NOT A NECESSARY PARTY DEFENDANT.

Assignment of error number three is as follows:

3. In holding and deciding that the United States Government as trustee for the defendants, is not an indispensable party to this suit.

It is true that the legal title to the property involved in this cause, is in the United States, and that the interest of the Indians is that of a *cestui que trust;* it should be noted, however, that this is not in any sense, a suit to enforce the trust, but is solely for the purpose of protecting the possession of the heir of the Indian to whom this land was allotted in trust.

The state court assumed jurisdiction simply to protect a possessory right, and to establish the identity and status of the person entitled to that possession under the allotment

Act of March 3, 1885, the general Act of February 8, 1887, and the amendatory Act of February 28, 1891.

Had this been a suit brought for the purpose of enforcing the trust, the United States would have been a necessary party and the state courts would have had no jurisdiction; the parties to this suit are citizens of the state of Oregon who have voluntarily submitted themselves to the jurisdiction of its courts, and they are bound by all matters that would properly be at issue in this cause.

This court held in the case of Hy-Yu-Tse-Mil-kin vs. Smith, 194 U. S., 401, a suit brought in a circuit court of the United States under the Act of August 15, 1894, but before the passage of the Act of February 6, 1901, that the United States was not a necessary party. The court said:

> "In our opinion, the claim that the United States must be made a party is without foundation; under the Act of 1894,*supra,* the circuit courts are given jurisdiction to try and determine any action of this nature, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty, * * * 'and the judgment or decree in any such court in favor of any claimant to an allotment of land, shall have the same effect when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. * * *'
>
> "The case at bar was commenced prior to the amendment of the statute of 1894, by the Act of February 6, 1901, 31 St., 760, wherein it is provided that the United States shall be a party defendant, and the case must be considered without regard to this amendment.
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> * * * * * * * * * * *
>
> "Under this statute there was no provision making it necessary in a private case between two claimants for an allotment of land, to make the United States a necessary party.

> "The contest here is between two Indians who claim the same land; the United States has no interest in the result, and, therefore, is not a necessary party."

If the United States was not a necessary party in a circuit court of the United States in a suit brought under the terms of the Act of August 15, 1894, it certainly was not a necessary party in a suit brought in a state court under its general jurisdiction which had for its object similar relief to that asked for in the suit in the circuit court, *supra*.

We wish to give credit for so much of this brief as deals with Assignments of Error numbers 2 and 3 to James A. Fee, Esq., of Pendleton, Oregon.

We respectfully submit that the decree of the Supreme Court of Oregon should be affirmed.

JOHN B. COTTON,
WM. FRYE WHITE,
For Defendant in Error.

Supreme Court of the United States.

No. 181.—October Term, 1906.

William McKay (substituted for Mary Kalyton) et al., Plaintiffs in Error, *vs.* Agnes Kalyton, by Louise Kalyton, her Guardian ad litem.	In error to the Supreme Court of the State of Oregon.

[February 25, 1907.]

This suit was commenced in the Circuit Court of Umatilla County, Oregon, by the filing of a complaint in the name of Agnes Kaylton, suing by her mother, Louise Kaylton, as guardian *ad litem*. Mary Kaylton and six others persons were made defendants, one such (Charles Wilkins) being sued as the acting United States Indian agent at the Umatilla reservation.

It was alleged in substance as follows: By virtue of an act of Congress approved March 3, 1885, and the amendments thereto, a tract of land in the Umatilla Indian reservation was duly allotted on April 21, 1891, to one Joe Kaylton, a member of the Cayuse tribe residing on said reservation. It was alleged that in or about the year 1893 Joe Kaylton, the allottee, in accordance with the customs of the Cayuse tribe, married Louise ————, an Indian woman of that tribe, and the plaintiff, Agnes Kaylton, was issue of the marriage. In 1898 Joe Kaylton died intestate, leaving the plaintiff as his sole heir, and, under the laws of Oregon and the provisions of the act of Congress referred to, she became entitled to the land allotted to her father and to the possession and enjoyment thereof. It was charged that Mary Kaylton and four of the defendents, all insolvent, claiming to be the heirs of the deceased, had taken and held possession of the land in question, which had a rental value of $274.75 per annum. It was alleged that one of the defendants named Glasscock claimed to have some interest in the land and was confederating with the other defendants, who were wrongfully alleging themselves to be the heirs of Joe Kaylton, with the object of depriving plaintiff of the use of the land and the enjoyment of the rents and profits thereof. Averring that under the rules and regulations of the Department of the Interior, in order that plaintiff might obtain the use and enjoyment of the land, it was requisite that her status as legal heir of the deceased should be adjudged by a court of competent jurisdistion, the court was asked to so decree and to perpetually restrain the defendants from interfering with her possessson and use of the land. General relief was also prayed.

An answer was filed on behalf of the defendant Mary Kalyton. It was therein denied in substance that there had been a marriage between Joe and Louise Kalyton, and that the plaintiff was their child, and, averring that Joe Kalyton was a resident and citizen of Oregon and had died intestate, unmarried and without any lineal descendant, it was alleged that the defendant, as the sister of Joe Kalyton, was his sole heir, and as such was the owner of and entitled to the possession of the lands in controversy and to its enjoyment. A decree was prayed quieting her alleged title.

The other of the defendants, who were alleged to be confederating with Mary Kalyton, filed a disclaimer of any interest in the lands in controversy. The cause was heard by the court. Deciding that if Joe Kalyton and Louise Kalyton had been married according to the custom of the Indians of the Cayuse tribe, such marriage would have been void, and that there had been no marriage between the parties, because none had been solemnized in accordance with the laws of the State of Oregon, the plaintiff was held to be an illegitimate child of the deceased, and to have no right, title or interest in or to the lands in question, and a decree was entered in favor of the defendant Mary Kalyton.

The cause was appealed to the Supreme Court of the State of Oregon. That court, having found that Joe and Louise Kalyton were married according to the custom and usage of the Indian tribe, to which they belonged, and that the plaintiff was the issue of such marriage, held, in view of the legislation of Congress, "that the plaintiff herein was born in lawful wedlock and is the sole heir of Joe Kalyton, deceased, and, as such, entitled to the possession of the real property of which he died seized." The decree of the trial court was, therefore, reversed, and a decree was entered in favor of the appellant in accordance with the opinion. A motion for a rehearing was made and overruled. This motion was based upon the contention that the court had erred in taking jurisdiction of the cause, for the reason that it involved the title and right to possession of public land held in trust by the United States for the benefit of Indians, and hence the United States was a necesary party defendant and not subject to the jurisdiction of a State court. We say the petition for a rehearing was based upon the grounds just stated, although the petition is not in the record, because it is manifest that such was the case from the opinion which the court delivered in refusing the rehearing. (45 Oregon, 116.) In that opinion the question whether the matter was one of exclusive Federal cognizance was elaborately considered, and it was decided that it was not, because a decree as to the right of possession would not interfere with the title or trust interest of the United States. And the court declared that for the purposes of determining its jurisdiction it was wholly irrelevant to consider whether it would have the power to enforce its decree for the possession of

the allotted land against the officer of the United States in charge of the Indian reservation in case that official should decline to give effect to the decree for possession.

The case was then brought to this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

It is contended that we are without jurisdiction because no title, right or immunity was specially set up or claimed under any Federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the State court under the laws of the United States, and that the right to the immunity so asserted under an act or acts of Congress was expressly considered and denied by the State court. True it is that the immunity which was asserted was first claimed in a petition for rehearing, but as the question was raised, was necessarily involved and was considered and decided adversely by the State court, there is jurisdiction. (*Leigh* v. *Green*, 193 U. S. 790.)

At the threshold lies the question raised and decided below relative to the jurisdiction of the State court over the controversy.

Allotments of land in severalty to Indians residing upon the Umatilla reservation, in Oregon, were authorized by the act of Congress of March 3, 1885, ch. 319, (23 Stat. L. 340,) which contained the following provision:

"The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided."

The allotment to Joe Kalyton was made on April 21, 1891. Before that allotment, Congress on February 8, 1887, (ch. 119, 24 Stat. L. 388,) passed what is known as the general allotment act. By that act, as said in *United States* v. *Rickert*, (188 U. S. 432, 435,) provision was made for the allotment of lands in severalty to Indians on the various reservations, and for extending the protection of the laws of the United States and the territories over the Indians. To that end the President was authorized,

whenever, in his opinion, a reservation or any part thereof was advantageous for agricultural and grazing purposes, to cause it, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in the reservation in severalty to any Indian located thereon, in certain quantities specified in the statute, the allotments to be made by special agents appointed for that purpose, and by the agents in charge of the special reservations on which the allotments were made. In one of the provisos of the first section of the act it was declared—

"That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act."

A provision of like nature to that heretofore excerpted from the act of March 3, 1885, was embodied in section 5 of the general allotment act of 1887, reading as follows (24 Stat. 389):

"SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided."

The supervisory power possessed by the United States over allotted lands while the title remains in the United States was pointed out in the opinion in *United States* v. *Rickert*, *supra*, a case which came to this court upon questions certified from a Circuit Court of Appeals. The suit was instituted under the direction of the Attorney General of the United States for the purpose of restraining the collection of taxes alleged to be due the county of Roberts, South Dakota, in respect of certain permanent improvements on, and personal property used in the cultivation of, lands in that county occupied by members of the Sisseton band of Sioux Indians in the State of South Dakota. The lands referred to had been allotted

under the provisions of an agreement made in 1889, ratified by an act of Congress in 1891, and more particularly under section 5 of the act of February 8, 1887, heretofore referred to. Discussing the interest which the Indians primarily acquired in the allotted land, it was concluded that "the United States retained the legal title, giving the Indian allottee a paper or writing improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. . . . These lands were held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them, or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees." And the court approvingly quoted the following passage from an opinion of the Attorney General, delivered in 1888, advising that allotments of lands provided for in an act of Congress were exempt from State or Territorial taxation, "that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority."

It was decided, in view of the object to be accomplished by allotting Indian lands in severalty, that it was not within the power of a State to tax either the permanent improvements made on allotted lands or the personal property consisting of cattle, horses and other property of like character which might be furnished to Indians for use upon such land. And, answering a question as to whether the United States had such an interest in the controversy or in its subjects as entitled it to maintain the suit, the court declared (p. 444) that no argument to establish that proposition was necessary. Nor are the principles which were thus announced as to the nature and character of an allotment of Indian lands and the interest of the United States therein as trustee before the expiration of the period for their final disposition in any way affected by the decision in the matter of Heff, (197 U. S. 488,) dealing with the subjection of allottee Indians in their personal conduct to the police regulations of the State of which they had become citizens.

The present suit was commenced in 1899. At that time there was in force an act approved August 15, 1894, ch. 290, (28 Stat. L. 286,) in which it was provided *inter alia*, as follows (p. 305):

"That all persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or

excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper circuit court of the United States."

And it was provided that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him."

Considering the act of 1894 in *Hy-yu-tse-mil-kin* v. *Smith*, (194 U. S. 413,) the court said:

"Under this statute there is no provision rendering it necessary in a private litigation between two claimants for an allotment to make the United States a party. The statute itself provides that the judgment or decree of the court, upon being properly certified to the Secretary of the Interior, is to have the same effect as if the allotment had been allowed and approved by the Secretary. This provision assumes that an action may be maintained without the government being made a party, and provides for the filing of a certificate of the judgment and its effect; and the government thereby, in substance and effect, consents to be bound by the judgment, and to issue a patent in accordance therewith."

The Rickert case settled that, as the necessary result of the legislation of Congress, the United States retained such control over allotments as was essential to cause the allotted land to enure during the period in which the land was to be held in trust "for the sole use and benefit of the allottees." As observed in the Smith case, (194 U. S. 408,) prior to the passage of the act of 1894, "the sole authority for settling disputes concerning allotments resided in the Secretary of the Interior." This being settled, it follows that prior to the act of Congress of 1894 controversies necessarily involving a determination of the title and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States were not primarily cognizable by any court, either State or Federal. It results, therefore, that the act of Congress of 1894, which delegated to the courts of the United States the power to determine such questions, cannot be construed as having conferred upon the State courts the authority to pass upon Federal questions over which, prior to the act of 1894, no court had any authority. The purpose of the act of 1894 to continue the exclusive Federal control over the subject is manifested by the provision of that act, which commands that a judgment or decree rendered in any such controversy shall be certified by the court to the Secretary of the Interior. By this provision, as pointed out in the Smith case, *supra*, the United States consented to submit its interest in the trust estate and the future control of its conduct concerning the same to the result of the decree of the courts of the United States, a power which such courts could alone exercise by virtue of the consent given by the act.

The subsequent legislation of Congress, instead of exhibiting a departure from this policy, confirms it. By the amendments to the act of 1894, approved February 6, 1901, ch. 217, (31 Stat. L. 750,) it is expressly required that in suits authorized to be brought in the Circuit Courts of the United States respecting allotments of Indian lands, "the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Nothing could more clearly demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject.

The suggestion made in argument that the controversy here presented involved the mere posession and not the title to the allotted land is without merit, since the right of possession asserted of necessity is dependent upon the existence of an equitable title in the claimant under the legislation of Congress to the ownership of the allotted lands. Indeed, that such was the case plainly appears from the excerpt which we have made from the concluding portion of the opinion of the Supreme Court of Oregon.

Because from the considerations previously stated we are constrained to the conclusion that the court below was without jurisdiction to entertain the controversy, we must not be considered as intimating an opinion that we deem that the principles applied by the court in disposing of the merits of the case were erroneous.

The judgment of the Supreme Court of Oregon is reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

The CHIEF JUSTICE, Mr. Justice BREWER and Mr. Justice PECKHAM dissent.

True copy.

Test:

Clerk Supreme Court U. S.